Supreme Court, U.S.
FILED

05-411 SEP 28 2005

OFFICE OF THE CLERK

No. 04-____

IN THE
Supreme Court of the United States

HAROLD BRUCE LONDON and
CHRISTINE SAUNDERS LONDON,
Petitioners,
v.

FIELDALE FARMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, DC 20016
(202) 237-7543

Cynthia Noles Johnson
Post Office Box 48
Cohutta, GA 30710
(706) 694-4298

Michael T. Kirkpatrick
Counsel of Record
David Arkush
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

September 2005

QUESTION PRESENTED

Whether the Packers and Stockyards Act's prohibition of "any unfair, unjustly discriminatory, or deceptive practice" extends to all such practices (as the Ninth and Tenth Circuits hold) or only to practices that have or are likely to have an adverse effect on competition (as the Seventh and Eleventh Circuits hold).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 3

A. Factual Background 3

B. Procedural Background 5

REASONS FOR GRANTING THE PETITION 6

I. The Decision Below Deepens a Longstanding Conflict Among the Federal Courts on Whether the PSA Prohibits Any Unfair, Unjustly Discriminatory, or Deceptive Practices or Only Those That Have an Anticompetitive Effect. 6

II. The Decision Below Is Wrong on the Merits 10

A. The Plain Text of the PSA Shows That It Reaches Practices Beyond Those That Adversely Affect Competition. 10

B. The Legislative History of the PSA Shows That It Was Intended to Prohibit a Broad Range of Unfair and Deceptive Practices, Not Just Those That Affect Competition. . 13

C. The Eleventh Circuit Erred By Not Deferring to USDA's Interpretation of the PSA. 16

III. The Circuit Conflict Is Untenable Given the Importance of the Question Presented and This Case Presents an Ideal Vehicle for Resolving It. . . 19

CONCLUSION 23

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Adkins v. Cagle Foods JV, LLC,
411 F.3d 1320 (11th Cir. 2005) 22

Am. Fin. Serv. Ass'n v. FTC,
767 F.2d 957 (D.C. Cir. 1985) 18

Armour & Co. v. United States,
402 F.2d 712 (7th Cir. 1968) 6, 7

Blackfoot Livestock Comm'n Co. v. Dep't of Agric.,
810 F.2d 916 (9th Cir. 1987) 7

Bruhns Freezer Meats of Chicago, Inc. v. USDA,
438 F.2d 1332 (8th Cir. 1971) 9, 17

Bunting v. Perdue, Inc.,
611 F. Supp. 682 (E.D.N.C. 1985) 20

Butz v. Glover Livestock Comm'n Co., Inc.,
411 U.S. 182 (1973) 8

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 16

In Re: Corn State Meat Co., Inc.,
45 Agric. Dec. 995, 1986 WL 74920 (1986) . 7, 16, 18

De Jong Packing Co. v. USDA,
618 F.2d 1329 (9th Cir. 1980) 9, 18

Excel Corp. v. USDA,
397 F.3d 1285 (10th Cir. 2005) 16

FTC v. Sperry & Hutchinson Co.,
405 U.S. 233 (1972) 15, 16, 17

Farrow v. USDA,
760 F.2d 211 (8th Cir. 1985) 8, 9

Gerace v. Utica Veal Co., Inc.,
580 F. Supp. 1465 (N.D.N.Y. 1984) 12

Glass v. Cagle Foods, Inc.,
No. 04-15431 (11th Cir. April 5, 2005) 22

Griffin v. Smithfield Foods, Inc.,
183 F. Supp. 2d 824 (E.D. Va. 2002) 9

Hays Livestock Comm'n Co., Inc. v. Maly Livestock Comm'n Co., Inc.,
498 F.2d 925 (10th Cir. 1974) 8

IBP, Inc. v. Glickman,
187 F.3d 974 (8th Cir. 1999) 18

In Re: ITT Con'l Baking Co.,
44 Agric. Dec. 748, 1985 WL 63151 (1985) ... 7, 18

Kinkaid v. John Morrell & Co.,
321 F. Supp. 2d 1090 (N.D. Iowa 2004) 12

Mahon v. Stowers,
416 U.S. 100 (1974) 13

Mims v. Cagle Foods JV, LLC,
2005 WL 1400259 (11th Cir. 2005) 22

Parchman v. USDA,
852 F.2d 858 (6th Cir. 1988) 9

Peterman v. USDA,
770 F.2d 888 (10th Cir. 1985) 8

Philson v. Goldsboro Milling Co.,
164 F.3d 625 (4th Cir. 1998) 9, 10

Sebastopol Meat Co. v. Sec'y of Agric.,
440 F.2d 983 (9th Cir. 1971) 8

Spencer Livestock Comm'n Co. v. Dep't of Agric.,
841 F.2d 1451 (9th Cir. 1988) 7, 8, 15

Stafford v. Wallace,
258 U.S. 495 (1922) 13

United States v. Donahue Brothers,
59 F.2d 1019 (8th Cir. 1932) 6, 9

Van Wyk v. Bergland,
570 F.2d 701 (8th Cir. 1978) 9

Williams v. Taylor,
529 U.S. 362 (2000) 12

Wilson & Co. v. Benson,
286 F.2d 891 (7th Cir. 1961) 6, 11

Wheeler v. Cagle Foods JV, LLC,
2005 WL 1349857 (11th Cir. 2005) 22

Statutes and Regulations

7 U.S.C. § 182(10) 4

7 U.S.C. § 192 ..... *passim*

7 U.S.C. § 213 ..... 6, 13

7 U.S.C. § 228 16

9 C.F.R. § 203 17

Legislative History

61 Cong. Rec. 1805 (1921) 14

H.R. Conf. Rep. No. 67-324 (1921) 14

H.R. Rep. No. 67-77 (1921) 14

S. Rep. No. 85-704 (1957) 15

Miscellaneous

Michael Donohue, *The Importance and Value of America's Poultry Farms*,
http://www.nationalchickencouncil.com/aboutIndustry/detail.cfm?id=20. 21

Marc Linder, *I Gave My Employer a Chicken That Had No Bone: Joint Firm-state Responsibility for Line-Speed-Related Occupational Injuries*, 46 Case Western L. Rev. 33 (1995) 21

Neil D. Hamilton, *Broiler Contracting in the United States—A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 Drake J. Agric. L. 43 (2002) 20

National Chicken Counsel, *Top 25 Broiler Producing States (Current as of June, 2004)*, http://www.nationalchickencouncil.com com/ statistics/stat_detail.cfm?id=9 20

National Chicken Counsel, *Growing Chickens Under Contract*, http://www. nationalchickencouncil.com/ aboutIndustry/detail. cfm?id=14. 21

Office of the Chief Economist, USDA, *World Agricultural Supply and Demand Estimates*, July 12, 2005, WASDE-424-29, http://usda.mannlib.cornell.edu/ reports/waobr/wasde-bb/ 2005/wasde07.pdf 21

Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. Mem. L. Rev. 1207 (1995) 3, 20

Eric Schlosser, *Fast Food Nation* (2001) 20

Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer-Meat Packer Relationships*,
8 Drake J. Agric. L. 91 (2003) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioners Harold Bruce London and Christine Saunders London seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a) is reported at 410 F.3d 1295 (11th Cir. 2005). The district court's unreported decision (Pet. App. 21a) is available at 2003 WL 23750660 (N.D. Ga. 2003).

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2005. Pet. App. 1a. On August 19, 2005, Justice Kennedy extended the time to file this petition to September 29, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 202 of the Packers and Stockyards Act (PSA) provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or

unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; c

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192.

STATEMENT

Petitioners Harold Bruce London and Christine Saunders London are family farmers who grew chickens under contract for respondent Fieldale Farms Corporation until Fieldale terminated the arrangement. The Londons sued Fieldale under the PSA alleging that the termination was unfair and in retaliation for Harold London's testimony against Fieldale in a race discrimination case. Although a jury found that the termination was without economic justification and violated the PSA, the district court granted Fieldale's motion for judgment as a matter of law on the ground that the PSA bars "any unfair, unjustly discriminatory, or deceptive practice" only where it causes or is likely to cause an anticompetitive injury. The Eleventh Circuit affirmed, but recognized that its decision conflicts with the opinions of other courts and the U.S. Department of Agriculture. This Court should grant review to resolve that important conflict.

A. Factual Background

The mass production of chicken meat in the United States is based on a complex business model under which a small number of integrated poultry companies carefully control each step of the process, either directly or through close supervision of contract farming facilities. *See generally,* Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers,* 25 U. Mem. L. Rev.

1207 (1995). Fieldale is such an integrated poultry company and is a "live poultry dealer" within the meaning of the PSA, 7 U.S.C. § 182(10). Pet. App. 10a n.4.

Fieldale owns feed mills, hatcheries, and processing plants, and contracts with "broiler growers" to care for the chickens from the time they leave Fieldale's hatchery until they are picked up for delivery to Fieldale's slaughter and processing facility. The time that the chickens spend on the grower farm is called the "grow out," and lasts for about 40 to 49 days. During the grow out, Fieldale maintains ownership of the chickens and provides the feed, vaccines, medications, and other supplies needed to raise the birds to processing age. Fieldale closely monitors the contract growers through weekly visits by a flock supervisor. Pet. App. 3a-4a.

Fieldale pays its broiler growers under a complex formula based on the weight of the chickens upon delivery to the processing facility and the amount of feed consumed by the birds during the grow out. The grower is compensated based on a comparison of his or her cost per pound against that of the other growers whose flocks were processed during the same week. Growers who have an above average feed conversion rate are paid a higher price per pound than those who are below average. Pet. App. 3a.

Although Fieldale's contract growers have control over some of the factors necessary for successful growth, such as maintaining adequate water and temperature and culling out birds that are behind in their growth, the major factors that affect productivity are within the exclusive control of Fieldale. For example, Fieldale controls the number, breed, and quality of the chicks placed on a contract grower's farm, the timing of feed deliveries and the quality of the feed delivered, the medications and vaccinations provided, and the timing of

broiler pickup for processing. Thus, Fieldale can affect a particular grower's performance relative to other growers by manipulating the factors it controls.

The Londons had extensive experience in the poultry industry before becoming contract growers for Fieldale in 1990. Pet. App. 2a. From 1990 to 1997, the Londons' flock performance was average or above average. In 1997, Harold London gave deposition testimony damaging to Fieldale in a lawsuit brought against Fieldale by an African-American prospective chicken grower who alleged that Fieldale denied him a contract because of his race. Pet. App. 4a. After Harold London's testimony, the Londons' flock performance declined, allegedly because Fieldale provided the Londons poor quality and diseased birds in retaliation for Harold London's testimony. In 1998, Fieldale terminated the Londons' contract, although the Londons were not Fieldale's worst performing growers. Pet. App. 18a.

B. Procedural Background

The Londons filed suit against Fieldale asserting claims under the PSA for wrongful termination of their broiler growing contracts. Specifically, the Londons alleged that the termination was not economically justified and was in retaliation for Harold London's testimony against Fieldale in the race discrimination case. The Londons also brought claims under the PSA and for breach of contract and fraud, alleging that Fieldale had misweighed birds raised by the Londons. The district court granted summary judgment for defendants on some of the Londons' claims, and the other claims proceeded to trial by jury. The jury returned a verdict for the Londons, finding that Fieldale had violated the PSA by terminating the Londons' poultry growing contracts without economic justification. The jury also found for the Londons on the

remaining weighing claims. After trial, the district court granted Fieldale's motion for judgment as a matter of law on the contract termination claim, setting aside the jury verdict because the Londons had not shown that the termination had an adverse effect on competition. Pet. App. 26a. On appeal, the U.S. Department of Agriculture (USDA) filed an amicus brief setting forth the agency's longstanding view that the PSA prohibits practices beyond those that cause an anticompetitive injury. Nevertheless, the court of appeals affirmed the judgment of the district court "that in order to prevail under the PSA, a plaintiff must show that the defendant's 'unfair, unjustly discriminatory, or deceptive practices' either had an adverse economic impact or were likely to produce an adverse economic impact." Pet. App. 20a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens a Longstanding Conflict Among the Federal Courts on Whether the PSA Prohibits Any Unfair, Unjustly Discriminatory, or Deceptive Practices or Only Those That Have an Anticompetitive Effect.

In the 47 years following the PSA's enactment in 1921, the courts and the USDA routinely applied its prohibition of "any unfair, unjustly discriminatory, or deceptive practice or device," 7 U.S.C. §§ 192(a) & 213(a), to situations where no anticompetitive effect was shown. *See, e.g., United States v. Donahue Bros.*, 59 F.2d 1019 (8th Cir. 1932) (commingling funds). In 1968, the Seventh Circuit departed from that interpretation and held that the PSA prohibits only anticompetitive conduct. *Armour & Co. v. United States*, 402 F.2d 712, 718 (7th Cir. 1968). The Seventh Circuit attempted to reconcile *Armour* with its decision in *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961), that 7 U.S.C.

§ 192(a) "does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language," by asserting that "the *Wilson* case does not support the Department's view that neither [predatory] intent nor some kind of competitive injury is necessary for the operation of" 7 U.S.C. § 192(a). *Armour*, 402 F.2d at 718. *Armour* analyzed the PSA's purpose and legislative history and concluded that "Congress gave the Secretary [of Agriculture] no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged." 402 F.2d at 722. USDA explicitly rejected *Armour*'s anticompetitive effect requirement, *see, e.g., In Re: ITT Cont'l Baking Co.*, 44 Agric. Dec. 748, 781-83, 1985 WL 63151, *25-26 (1985); *In Re: Corn State Meat Co., Inc.*, 45 Agric. Dec. 995, 1023-24, 1986 WL 74920, at *20-21 (1986), and, until recently, the courts largely ignored it.

Relying heavily on *Armour*, the court below joined the Seventh Circuit in limiting the reach of the PSA to situations where the unfair, unjustly discriminatory, or deceptive practice has an anticompetitive effect. Pet. App. 12a-15a. The Eleventh Circuit recognized that its decision conflicts with the Ninth Circuit's conclusion that the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics." *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1455 (9th Cir. 1988). Indeed, *Spencer* held that a showing of fraud alone could violate the PSA—in that case, fraud through the use of false weights, the failure to submit complete and accurate accountings, and the destruction of invoices and other documents—because it is deceptive. *Id.* at 1454. The Ninth Circuit noted that USDA "has consistently ruled false inflations

to purchase weight deceptive under § 213." *Id.* (citing *In re Collier*, 38 Agric. Dec. 957 (1979); *In re Boone Livestock Co.*, 27 Agric. Dec. 475 (1968); *In re Fairbank*, 27 Agric. Dec. 1371 (1968)). *See also Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182 (1973) (affirming USDA suspension of market agent for misweighing violations). Previously, the Ninth Circuit had upheld a USDA determination that check-kiting violates the PSA because it is "deceptive," *Blackfoot Livestock Comm'n Co. v. Dep't of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987), and had held that even a failure to pay money when owed—essentially a breach of contract—violated 7 U.S.C. § 192(a). *Sebastopol Meat Co. v. Sec'y of Agric.*, 440 F.2d 983, 983 (9th Cir. 1971).

The Eleventh Circuit's decision below also conflicts with the Tenth Circuit's interpretation of the PSA. The Tenth Circuit has held that a refusal to pay for livestock violates the Act, *Hays Livestock Comm'n Co., Inc. v. Maly Livestock Comm'n Co., Inc.*, 498 F.2d 925, 932 (10th Cir. 1974) (finding refusal to pay "unjust and unreasonable" under goal of "effectuat[ing] the policy of a federal Act prohibiting 'every unjust, unreasonable, or discriminatory regulation or practice'"), and has recognized a violation for "bait-and-switch" sales tactics. *Peterman v. USDA*, 770 F.2d 888, 890 (10th Cir. 1985) (affirming USDA determination that "bait-and-switch" sales tactics were "deceptive"). Thus, the decisions of the Seventh and Eleventh Circuits conflict with those of the Ninth and Tenth Circuits.

The Eighth and Sixth Circuits have not addressed directly the question presented in this case, but there is some indication that they lean towards the position embraced by the Seventh and Eleventh Circuits. The court below suggested that its interpretation of the PSA is consistent with that of the Eighth Circuit in *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985). *See*

Pet. App. 13a. *Farrow* held, in the context of allegations of anticompetitive conduct, that the government's showing of likely (rather than *actual*) competitive harm was sufficient. 760 F.2d at 214 ("We agree with the JO that a practice which is likely to reduce competition and prices paid . . . can be found an unfair practice . . . even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had that result."). But *Farrow* did not address whether the PSA requires a showing of likely competitive harm in *all* cases, and the Eighth Circuit has previously found PSA violations where there was no such showing. *See, e.g., Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978) (refusal to pay for livestock); *Bruhns Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1335-36 (8th Cir. 1971) (petitioner did not challenge USDA determination that "bait-and-switch" violated § 192(a)); *Donahue Bros.*, 59 F.2d 1019 (market agent violates the PSA by commingling funds from shippers' and consignors' accounts with his own). Similarly, the Sixth Circuit has held that even unintentional and harmless misweighing violates the PSA, *Parchman v. USDA*, 852 F.2d 858, 864 (6th Cir. 1988), but it prefaced its conclusion by noting that misweighing can have an adverse effect on the market.[1]

---

[1]The court below also relied on *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), and *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824 (E.D. Va. 2002), but these cases also considered only anticompetitive conduct and did not pass on the question whether the PSA prohibits other conduct as well. The Eleventh Circuit also purported to rely on the Fourth Circuit's unpublished decision in *Philson v. Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998) (table, text at 1998 WL 709324)). Although *Philson* concluded that

The circuit split is longstanding—*Armour* was decided in 1968 and *Spencer* in 1988—and it has become more entrenched with the Eleventh Circuit's decision to adopt the Seventh Circuit's position, while acknowledging the contrary view of the Ninth Circuit. The Court should grant certiorari to resolve the conflict.

II. The Decision Below Is Wrong on the Merits.

The Court should also grant certiorari because the decision below is wrong. By its plain text, the PSA prohibits "*any* unfair, unjustly discriminatory, or deceptive practice," not only those that cause competitive harm. Legislative history confirms this construction of the statute, and USDA, the agency charged with enforcement of the PSA, interprets the statute the same way.

A. The Plain Text of the PSA Shows That It Reaches Practices Beyond Those That Adversely Affect Competition.

The text of the PSA does not impose the limitation that the court below and others have read into it. Section 192(a) prohibits packers, swine contractors, and poultry dealers from "Engag[ing] in or us[ing] *any* unfair, unjustly discriminatory, or deceptive practice or device," (emphasis added), and 7 U.S.C. § 192(b) prohibits them from "[m]ak[ing] or giv[ing] any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject[ing] any particular person or locality to any undue or unreasonable

---

contract termination without economic justification was not a *per se* violation of the PSA, *Philson* did not hold that one must always show anticompetitive effect to establish a PSA violation.

prejudice or disadvantage in any respect whatsoever." Neither subsection 192(a) nor 192(b) mentions anticompetitive practices. *See Wilson & Co.*, 286 F.2d at 895 (7 U.S.C. § 192(a) "does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language").

That the plain text of § 192(a) does not require an anticompetitive effect is further demonstrated by subsections (c) through (e), which *do* require that the challenged conduct have an anticompetitive purpose or effect:

> It shall be unlawful . . . to:
>
> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating

> a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce[.]

7 U.S.C. §§ 192(c)-(e). The plain reading of 7 U.S.C. § 192 is that subsections (c) through (e) bar only anticompetitive conduct, and subsections (a) and (b) prohibit *any* unfair, unjustly discriminatory, or deceptive conduct. Given that subsections (c)-(e) bar *all* anticompetitive acts, limiting subsections (a) and (b) to the same acts would render them superfluous, violating the "cardinal principle of statutory construction" that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). As one district court stated:

> [T]he structure of the statute suggests that "unfair" or "deceptive" practices are prohibited separately and apart from anticompetitive or "monopolistic" practices, where these classes of conduct are prohibited in separate subsections. . . . [O]nly a strained reading of the statute could require that practices that are "unfair" or "deceptive" within the meaning of § 192(a) must also be "monopolistic" or "anticompetitive" to be prohibited.

Kinkaid v. John Morrell & Co., 321 F. Supp. 2d 1090, 1102-03 (N.D. Iowa 2004) (citation omitted); *see also Gerace v. Utica Veal Co., Inc.*, 580 F. Supp. 1465, 1469-70 (N.D.N.Y. 1984) (holding that § 192(a) is not limited to conduct with an anticompetitive effect because it does not contain the express limitations found in subsections (c) through (e)).

Indeed, this Court has recognized that although "the monopoly of the packers" was the "chief" (rather than

exclusive) evil addressed by the PSA, *Stafford v. Wallace*, 258 U.S. 495, 514 (1922), "[a]nother evil" addressed by the PSA "was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion" between the various players in the industry. *Id.* at 515. Similarly, this Court has noted that 7 U.S.C. § 192 puts "heavy" (not exclusive) emphasis on practices that "might be considered to be in restraint of trade." *Mahon v. Stowers*, 416 U.S. 100, 107 (1974).

That the plain text of § 192(a) prohibits all unfair and deceptive practices, rather than just those that have or are likely to have an anticompetitive effect, is further demonstrated by the structure of § 213(a), which applies to stockyard owners, market agencies, and dealers. Like § 192(a), § 213(a) bars "any unfair, unjustly discriminatory, or deceptive practice" without regard to whether those practices have an anticompetitive effect. Although some of the conduct to which § 213(a) applies—such as "determining whether persons should be authorized to operate at the stockyards"—is conduct that affects competition, the statute on its face encompasses other conduct—such as feeding, watering, weighing, and handling—that could be unfair or deceptive but would lack any anticompetitive effect. *Id.*

B. The Legislative History of the PSA Shows That It Was Intended to Prohibit a Broad Range of Unfair and Deceptive Practices, Not Just Those That Affect Competition.

Because the PSA's text is clear, resort to legislative history is unnecessary. Nevertheless, legislative history confirms that the PSA was intended to prohibit practices beyond those with an anticompetitive effect. The Conference

Report accompanying the PSA stated that "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921). The House Report stated:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; *that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.*

H.R. Rep. No. 67-77, at 2 (1921) (emphasis added).

During floor debates, one House member distinguished the PSA from the Federal Trade Commission Act (FTC Act), which then barred only "unfair competition," meaning "a violation of the rights of . . . a competitor on the same plane." 61 Cong. Rec. 1805 (1921) (statement of Rep. Anderson). The PSA would "go further," he explained, and "affect the public interest to a large extent," barring "the unfair competition *or unfair practice* as between the packer and the general public, the packer and the producer, or the packer and any other agency connected with the marketing of livestock." *Id.* (emphasis added). Indeed, the PSA would even bar violations of "moral rights." *Id.* The bill was "openly proclaimed as going further than ever before in the way of interference with the private business of the country." *Id.* at 806 (statement of Rep. Luce). These debates show that Congress understood the PSA to grant the USDA broad authority to ensure equitable fairness and honesty, not just fair competition. *See also* Michael C. Stumo

& Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer-Meat Packer Relationships*, 8 Drake J. Agric. L. 91 (2003).

Indeed, when Congress in 1938 broadened the language of the FTC Act to confirm that it would reach unfair conduct beyond that which had an effect on competition, it used the same language it had used in the PSA, augmenting the FTC's charge to stop "unfair methods *of competition*" with the additional task of guarding against "unfair and deceptive acts or practices" without reference to competition. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241-44 (1972) (describing the amendment as confirmation of the Supreme Court's decision in *FTC v. Keppel & Brother, Inc.*, 291 U.S. 1354 (1931), that § 5 of the FTC Act extended beyond anticompetitive behavior). Similarly, in 1957, Congress confirmed that the PSA was intended to cover practices beyond those with an anticompetitive effect when it noted that only 8 of 32 cease-and-desist orders issued under 7 U.S.C. § 192 had dealt with "monopolistic practices" and that more than half of the orders concerned "refusal to pay for livestock." S. Rep. No. 85-704, at 7 (1957). Congress expressed frustration that USDA had focused too little on anticompetitive conduct, but it also decried USDA's lethargy in prosecuting violations such as fraud, *id.* at 8, and false and deceptive advertising, *id.* at 14-15, that do not have an anticompetitive effect. Thus, although "[t]he primary purpose of the [PSA] was 'to assure fair competition and *fair trade practices* in livestock marketing[,] . . . [i]t was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics." *Spencer*, 841 F.2d at 1455 (emphasis in original; citation omitted).

C. The Eleventh Circuit Erred By Not Deferring to USDA's Interpretation of the PSA.

The Eleventh Circuit also erred by declining to defer to USDA's interpretation of the phrase "unfair, unjustly discriminatory, or deceptive." As argued above, the PSA's plain text, structure, history, and purpose demonstrate that the Act is not limited to preventing anticompetitive conduct. Even if one were to disagree with that conclusion, to the extent that the PSA's text is ambiguous, Congress granted USDA authority to interpret it. *See* 7 U.S.C. § 228 (granting USDA authority to issue "such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter"); *see also Excel Corp. v. USDA*, 397 F.3d 1285, 1293 (10th Cir. 2005) ("[I]t is clear that Congress granted the USDA authority to implement and enforce the P & S Act."); *cf. Sperry & Hutchinson*, 405 U.S. at 244 (FTC has broad authority to interpret the phrases "unfair methods of competition" and "unfair or deceptive acts or practices" in § 5 of the FTC Act). USDA's reasonable interpretations of the PSA are, therefore, entitled to deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

USDA has determined in adjudicatory proceedings that the PSA reaches practices that pose no threat to competition, but are nevertheless unfair, discriminatory, or deceptive. For example, USDA has explained that in interpreting the terms "undue" and "unjust," "substantial weight must be given to whether the business activities were carried on in good faith by normally fair methods not heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression." *Corn State Meat*, 45 Agric. Dec. at 1021, 1986 WL 74920, at *18 (citing *Swift & Co. v. Wallace*, 105 F.2d 848, 856 (7th Cir. 1939) (internal quotes omitted)). Nothing in the text of the PSA bars USDA from prohibiting

"moral" wrongs that cause no harm to competition—such as bribing government employees or engaging in discrimination on account of race.[2] To the contrary, the courts have recognized that "the Packers and Stockyards Act is remedial legislation and should be liberally construed to further its life and fully effectuate its public purpose." *Bruhn's Freezer Meats*, 438 F.2d at 1336 (citing *Stafford*, 258 U.S. at 521; *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966)). And this Court has long interpreted analogous language in the FTC Act to prohibit conduct that offends public policy but has no anticompetitive effect. *See Sperry & Hutchinson*, 405 U.S. 233.

USDA has also declared in formal proceedings that it recognizes *per se* violations of the PSA such that the agency and private plaintiffs need not prove harm, or even the likelihood of harm. The USDA has explained that certain PSA violations are difficult to detect or prove:

> If proof of a likelihood of injury were required in cases involving the failure of a respondent to have the required bond, all, or almost all, of the bonding violation cases would be dismissed. . . . [W]e do not have a crystal ball to enable us to make a finding of fact that the failure of a particular respondent to have a bond is likely to result in injury.

---

[2]*See* 9 C.F.R. § 203.2 (policy statement that the giving of gifts to government employees violates § 192(a)); *id.* § 203.12 (policy statement that discrimination on the basis of race, religion, color, or national origin in the furnishing of stockyard services or facilities violates the § 213(a)).

> Similarly careless or deliberate false weighing is an "unfair" practice under the Act irrespective of any proof of predatory intent or likelihood of injury. Anyone who thinks that the likelihood of injury in a false weighing case is obvious is unaware of the intricacies of false weighing violations.

Corn State Meat, 45 Agric. Dec. at 1026-28, 1986 WL 74920, at *21-23. *See also ITT Cont'l Baking*, 44 Agric. Dec. at 783-85, 1985 WL 63151, at *26-27. For these reasons, the USDA "has consistently taken the position that in order to prove that a practice is 'unfair' under [§§ 192(a) or 213(a)], it is not necessary to prove predatory intent, competitive injury, or likelihood of injury[.]" *ITT Cont'l Baking*, 44 Agric. Dec. at 781, 1985 WL 63151, at *25; *id.* at 783, *26 ("Many types of practices have been held to be 'unfair' under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury."); *see also Corn State Meat*, 45 Agric. Dec. at 1023, 1025, 1986 WL 74920, at *20-21.

Nothing in USDA's interpretation conflicts with the text of the PSA. Courts have recognized that the PSA empowers USDA to stop violations before they cause harm. *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *De Jong*, 618 F.2d at 1336-37. Thus, USDA may establish *per se* violations of the PSA just as the FTC has done in the context of the FTC Act. *E.g., Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985).

The Eleventh Circuit declined to defer to USDA because USDA does not adjudicate poultry cases. Pet App. 14a. But USDA has authority to interpret the PSA through case-by-case adjudication as to all other meat and has authority to issue binding regulations interpreting 7 U.S.C. §§ 192 & 213

as to all meat, *including poultry*. Those regulations are intended to govern the conduct of all participants in the poultry producing market and to guide *private* adjudication in poultry cases. That the PSA carves one area out of USDA's adjudicatory authority does not mean that courts should disregard the agency's long-standing interpretation of the law when confronting cases in that area. The Eleventh Circuit's refusal to defer to the USDA's interpretation here means that the *same* statutory language may impose different requirements for meat and poultry (at least in the Eleventh Circuit)—a result that Congress could not have intended.

III. The Circuit Conflict Is Untenable Given the Importance of the Question Presented and This Case Presents an Ideal Vehicle for Resolving It.

This case concerns the PSA's application to the entire United States meat industry and has implications for thousands of farms and millions of consumers. The circuit split requires this Court's attention because it makes USDA regulatory authority and private rights and duties contingent on geography. Farmers in the Ninth and Tenth Circuits can seek redress for the full range of unfair and deceptive practices as Congress intended, but farmers in the Eleventh and Seventh Circuits cannot. Further, the circuit split subjects some of the same poultry companies to different federal regulation for their operations in different states. The impact of the decision below is particularly acute because two of the top-three chicken-producing states in the country—Georgia and Alabama—are in the Eleventh Circuit.[3]

---

[3]National Chicken Counsel, *Top 25 Broiler Producing States (Current as of June, 2004)*, at http://www.nationalchickencouncil.com/statistics/stat_detail.cfm?id=9.

It is important for small farmers such as the Londons to have a remedy against integrated poultry companies like Fieldale because of the nature of the industry. Integrated poultry processors control virtually every aspect of the chicken growing process, yet the processors rank the growers on the ratio of growing costs to pounds of chicken delivered and pay the growers in proportion to their rank.[4] This system shifts profits to processors and costs, risks, and liabilities to the contract growers. It both depends on, and perpetuates, vast disparities in bargaining power, leaving individual contract growers at the whim of the processors:

> A chicken grower who is unhappy with his or her processor has little power to do anything about it. Poultry contracts are short-term. Growers who complain may soon find themselves with empty poultry houses and debts that still need to be paid. Twenty-five years ago, when the United States had dozens of poultry firms, a grower stood a much better chance of finding a new processor and of striking a better deal. Today growers who are labeled "difficult" often have no choice but to find a new line of work. A processor can terminate a contract with a grower whenever it likes. It owns the birds. Short of punishment, a processor can prolong the interval between the departure of one flock and the arrival of another. Every day that

---

[4] *See generally Bunting v. Perdue, Inc.*, 611 F. Supp. 682, 683 (E.D.N.C. 1985); Neil D. Hamilton, *Broiler Contracting in the United States—A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 Drake J. Agric. L. 43 (2002); Roth, *supra*; Eric Schlosser, *Fast Food Nation*, 139-42 (2001).

> poultry houses sit empty, the grower loses money.[5]

The disparity in bargaining power is perhaps reflected most starkly in the grossly uneven distribution of returns from chicken's rising profitability. From 1988 to 2004, advances in growing methods reduced the amount of food and the number of days required to grow chicken, decreased condemnation rates, and doubled chicken production overall. But while the value of broiler production increased by 300%, pay to growers increased only 20%.[6] Indeed, a 1995 study found that the contract growers received only about 59 cents an hour for their work.[7] Over 90% of the 40 billion pounds of poultry produced in the United States last year was grown under these contract arrangements.[8]

---

[5]Schlosser, at 141. *See also id.* at 139 ("[C]hicken growers . . . in recent years have become virtually powerless, trapped by debt and by onerous contracts written by the large processors."); Marc Linder, *I Gave My Employer a Chicken That Had No Bone: Joint Firm-state Responsibility for Line-Speed-Related Occupational Injuries*, 46 Case Western L. Rev. 33, 46-39 (1995).

[6]Michael Donohue, *The Importance and Value of America's Poultry Farms*, at http://www.nationalchickencouncil.com/aboutIndustry/detail.cfm?id=20.

[7]Linder, 46 Case Western L. Rev. at 46 (citing Mary Clouse, *Farmer Net Income from Broiler Contracts* (Rural Advancement Foundation International-USA), Jan. 1995, at 5.).

[8]Office of the Chief Economist, USDA, *World Agricultural Supply and Demand Estimates*, July 12, 2005, WASDE-424-29,

Growers have a range of complaints against the processors. Many suspect the processors of manipulating results by delivering poor-quality chicks, delaying shipments of food and medicine, or misweighing birds, and many suspect the processors have retaliated against them for attempting to organize contract growers' associations. *See generally,* Roth, *supra*. Their complaints have led to a flurry of recent litigation in Georgia, the nation's leading state for chicken production. *See, e.g., Adkins v. Cagle Foods JV, LLC,* 411 F.3d 1320 (11th Cir. 2005); *Wheeler v. Cagle Foods JV, LLC,* 2005 WL 1349857 (11th Cir. 2005); *Mims v. Cagle Foods JV, LLC,* 2005 WL 1400259 (11th Cir. 2005); *Glass v. Cagle Foods, Inc.*, No. 04-15431 (11th Cir. April 5, 2005).

USDA has determined, based on its expertise, that common-law remedies are insufficient to protect contract growers from the severe economic harm they suffer when processors treat them unfairly. USDA Br. 19-22. For that reason, USDA filed a brief *amicus curiae* below urging the court to accept USDA's determination that termination of a poultry growing contract without economic justification violates 7 U.S.C. § 192(a). This Court should grant this petition for certiorari to resolve a split among the circuits and ensure that USDA can exercise its regulatory authority as Congress intended.

There is no doubt that this case presents an excellent vehicle for resolving the question presented. The issue whether

---

at http://usda.mannlib.cornell.edu/reports/waobr/wasde-bb/2005/wasde07.pdf; National Chicken Counsel, *Growing Chickens Under Contract, at* http://www.nationalchickencouncil.com/aboutIndustry/detail.cfm?id=14.

the PSA requires a showing of competitive injury was squarely presented, and the Eleventh Circuit analyzed the issue at great length. Moreover, the question presented is indisputably outcome determinative here: The jury returned a verdict for the Londons on their termination claim and awarded $164,000 before the district court granted Fieldale's motion for judgment as a matter of law. If the Court grants certiorari and reverses the Eleventh Circuit's holding, the jury's verdict would be reinstated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, DC 20016
(202) 237-7543

Cynthia Noles Johnson
Post Office Box 48
Cohutta, GA 30710
(706) 694-4298

Michael T. Kirkpatrick
Counsel of Record
David Arkush
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

September 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10040

D. C. Docket No. 01-00202-CV-WCO-2

HAROLD BRUCE LONDON,
CHRISTINE SAUNDERS LONDON,

Plaintiffs-Appellants,

versus

FIELDALE FARMS CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 1, 2005)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

DUBINA, Circuit Judge:

Appeliants, Harold Bruce London and Christine London, appeal the district court's order granting summary judgment to appellee/defendant, Fieldale Farms Corporation, on the Londons' Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.*, ("PSA") retaliation and improper weighing claims. The Londons also appeal the district court's order granting Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim and state law breach of

contract and fraud claims. For the reasons that follow, we affirm the district court's orders.

BACKGROUND

A. *Facts*

Fieldale is an integrated poultry company which enters into poultry growing contracts with growers. Fieldale owns various poultry feed mills, hatcheries, and processing plants. Fieldale's processing operations emanate from a business paradigm known as "contract farming."

Harold London worked as a broiler[1] flock supervisor and broiler manager for three different companies from 1979 until 1995. Christine London managed hen houses in the 1970's and worked as a chicken vaccinator for a poultry company in the 1980's. In 1987, the Londons purchased a nine acre farm that contained one chicken house for growing broilers ("Green Meadows No. 1"). In addition to this one broiler house on their residence, the Londons leased two other farms, the J.W. Peck Farm, which had one poultry house, and the Merritt Martin Farm (later known as "Green Meadows No. 2"), which had two chicken houses. At the time the Londons purchased their farm, Mar-Jac Poultry Company employed Harold and agreed to place broilers on the Londons' farm. In 1990, Fieldale offered Harold a job as a broiler serviceman. After Harold commenced his employment with Fieldale, the Londons switched their grower contracts from Mar-Jac to Fieldale. In 1995, Fieldale terminated Harold's employment.

The Londons and Fieldale entered into three contracts that governed their grower arrangement. The contracts are similar in content. Each contract is a separate agreement for the Londons' various farms: (1) contract for Green Meadows No.

---

[1]A broiler is a baby chick.

1; (2) contract for Green Meadows No. 2; and (3) contract for the J.W. Peck Farm. The contracts are to run indefinitely or until thirty days after notice of termination by either party. The contracts also give Fieldale the option to terminate on only seven days notice when continuing the contractual relationship would have detrimental effects on Fieldale's business.

Pursuant to its contracts with the Londons, Fieldale provides them with broilers, as well as the feed and medication necessary for successful growth. In return, the Londons are responsible for providing care and oversight for the broilers during the full term of the growth cycle, which normally lasts for forty to forty-nine days. The Londons' responsibility is vital to the success of the business and encompasses a variety of duties, such as maintaining adequate water and temperature for the baby chicks and "culling" out birds that are behind in growth. At the end of the grow-out period, Fieldale crates the broilers and ships them to its processing plants. After Fieldale delivers the broilers to the processing plants, Fieldale weighs the birds, crates, and trucks on scales specifically designed to determine the birds' live weight.

Fieldale pays its broiler growers based upon a complex formula, primarily taking into account the weight of the birds upon their arrival at the plant and the feed consumed by the birds during the grow-out period. Fieldale compares its growers based upon the cost of producing the finished broilers. This comparison determines the relative performance of the grower. Fieldale determines the average cost per pound for all of the birds processed during a one week period. Fieldale then determines the cost per pound for each grower whose birds were processed during that week. Fieldale deducts money from the grower's check if his cost is above average, and adds money back to the grower's check if the cost of producing the broilers is below average. In other words, Fieldale gives those growers who are most cost efficient a higher per-pound rate than those growers who cost Fieldale more money in food and medicine.

As part of its contractual duty to provide technical service, Fieldale assigns flock supervisors to visit the grower farms on a weekly basis to assist the growers with the management of the broilers. Fieldale's flock supervisors are required to maintain service reports on each grower farm. Fieldale also requires the flock supervisors to document any problems they find on the grower farms that endanger the broilers' welfare.

In 1997, Harold gave a deposition in a lawsuit against Fieldale. In that case, an African-American prospective chicken grower alleged that Fieldale denied him a contract to grow chickens because of his race. Fieldale had never contracted with an African-American grower. In his deposition, Harold testified that his supervisor, Doug Hatley, made racially derogatory comments. After Harold's testimony, the Londons allege that they began to notice that their flock supervisor was increasingly critical of their farm management. The Londons contend that in the spring of 1998, the flock supervisor checked on the Green Meadows No. 2 Farm and informed Christine that if they were not above average on the present flock then "they"[2] would terminate the grower contract. When the flock came in below average, Fieldale stopped delivering broilers to the farm. Later, another flock supervisor told the Londons that the remaining two farms would only get one more bunch of birds. The Londons assert that the last flocks Fieldale delivered were infected with a disease known as gumboro.[3]

---

[2]Christine testified that she understood the word "they" to mean Fieldale. [R. Vol. 7 p. 2632].

[3]Gumboro, or infectious bursal disease, is a viral disease that attacks young broiler chickens, usually between 18 and 26 days of age. The disease attacks the immune system, particularly the B cells, which produce antibodies. [R. Vol. 6 p.

B. *Procedural History*

On November 20, 2001, the Londons filed suit against Fieldale asserting claims under the PSA for wrongful termination of their poultry growing contracts, alleging that the termination was without economic justification and in retaliation for Harold London's testimony in a racial discrimination lawsuit against Fieldale. The Londons asserted a PSA misweighing claim, alleging that Fieldale failed to transport promptly the Londons' birds after loading and failed immediately to weigh the birds upon arrival at the processing plant. The Londons also asserted state law claims for breach of contract and fraud. After discovery, Fieldale filed a motion for summary judgment. The district court granted the motion for summary judgment on the Londons' contention that Fieldale provided them with substandard chicks in retaliation for Harold's testimony in the race discrimination lawsuit; on the Londons' claim that Fieldale improperly failed to make fuel weight adjustments on the flocks from the Green Meadows Farms; on two other vague weighing claims; on the Londons' retaliation claim; and on the Londons' prompt weighing and transportation claim. The case proceeded to trial with the following issues presented to the jury: (1) whether Fieldale violated the PSA in terminating the Londons' poultry growing contracts without economic justification; (2) whether Fieldale violated the PSA by failing to make a fuel weight adjustment on the flocks from the J.W. Peck Farm; (3) whether Fieldale violated the PSA by failing to make a wet bird adjustment to the weight of the flocks; and (4) whether Fieldale breached its contract with the Londons or defrauded the Londons by sending them settlement documents containing inaccurate weights.

After the Londons presented their case, Fieldale moved for a judgment as a matter of law on all claims. The district

---

179-81].

court granted the motion on the Londons' state law claims, on any PSA wet bird claim that arose prior to November 20, 1997, and on each PSA fuel adjustment claim except for those related to the J.W. Peck Farm. The district court reserved ruling on the termination claim. At the close of the evidence, Fieldale renewed its motion for judgment as a matter of law as to the post-November 20, 1997, wet birds claims, the J.W. Peck Farm fuel adjustment claim, and the PSA termination claim. The district court denied the motion, again reserving consideration of the motion as to the PSA termination claim. The jury returned a verdict in favor of the Londons on their termination claim and awarded them $164,000.00. The jury also returned a verdict for the Londons on the wet bird claim, awarding them $225.00, and on the fuel adjustment claim, awarding them $32.00. After trial, Fieldale filed a renewed motion for judgment as a matter of law and, in the alternative, a motion for a new trial. The district court entered an order granting Fieldale's motion for judgment as a matter of law on the Londons' termination claim, setting aside $164,000.00 of the judgment. The Londons timely appealed.

ISSUES

1. Whether the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim because the Londons did not show that the termination had an adverse effect on competition.

2. Whether the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' state law claims for breach of contract and fraud.

3. Whether the district court properly granted Fieldale's motion for summary judgment on the Londons' PSA retaliation claim.

4. Whether the district court properly granted Fieldale's motion for summary judgment on the Londons' PSA improper weighing claims.

STANDARDS OF REVIEW

This court reviews *de novo* the district court's order granting a party's motion for judgment as a matter of law. *Rossbach v. City of Miami*, 371 F.3d 1354, 1356 (11th Cir. 2004). "A judgment as a matter of law is warranted only '[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *U.S.S.E.C. v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (quoting Fed. R. Civ. P. 50(a)(1)). This court also reviews *de novo* the district court's order granting summary judgment, applying the same legal standards that governed the district court's decision. *Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002).

DISCUSSION

A. *Statutory Provision*

At issue in this case is Section 202 of the PSA which provides that:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> > (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
> >
> > (b) Make or give any undue or unreasonable preference or advantage to any particular

person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly

> in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
>
> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192 (2004).

The PSA was enacted in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers." *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974). At the time Congress enacted the PSA, "[t]he chief evil feared [was] the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514-15, 42 S. Ct. 397, 401 (1922). "Section 202 of the original Act made it unlawful for any 'packer' to engage in any anticompetitive, monopolistic, discriminatory, or deceptive practices." *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 281 (2nd Cir. 1982). In 1935, Congress amended the PSA to include "live poultry dealers and handlers," *see id.* at 280-82, and later included swine contractors. The PSA authorizes the Secretary of Agriculture to enjoin violations of Section 202(a) by packers and swine

contractors. *See* 7 U.S.C. § 193. The PSA does not, however, authorize the Secretary to enjoin violations by live poultry dealers.[4] *See id.* Persons injured as a result of a violation by a live poultry dealer may bring an action in federal district court to recover "the full amount of damages sustained in consequence of such violation." 7 U.S.C. § 209(a).

B. *Issues*

1. Section 202(a) requires an anti-competitive effect.

The Londons contend that the district court erred in granting Fieldale's motion for judgment as a matter of law on their PSA termination claim because Fieldale terminated their grower contracts without sufficient economic justification in violation of 7 U.S.C. § § 192(a) and (b). Section 192(a) prohibits packers from engaging in or using any "unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 192(b) prohibits packers from subjecting "any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." 7 U.S.C. § 192(b). The statute does not define what constitutes an "unfair, unjustly discriminatory, or deceptive practice." The Londons and *amicus* United States Department of Agriculture ("DOA") contend that the plain language of the statute, the purpose of the PSA, and the DOA's interpretation all indicate that in order to prove that any practice is "unfair" under § 202(a), it is not necessary to prove predatory intent, competitive injury, or likelihood of injury. Fieldale and *amicus*

---

[4]There is no question that Fieldale is a "poultry dealer" under the PSA. A "live poultry dealer" is "any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another." 7 U.S.C. § 182(10).

National Chicken Council counter that the district court properly determined that plaintiffs must show that the unfair, discriminatory or deceptive practice adversely affected competition in order to prevail under the PSA. This is an issue of first impression for our circuit.

"As in all cases of statutory construction, our task is to interpret the words of the[] statute[] in light of the purposes Congress sought to serve." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36, 104 S. Ct. 304, 307 (1983) (quotation and citation omitted); *see also United States v. Gonzalez*, 671 F.2d 441, 443 (11th Cir. 1982) (noting that "this court's task is to construe the statute in light of the purposes Congress sought to serve"). Along those lines, courts have construed the PSA "against the backdrop of corruption the Act was intended to prevent." *Philson v. Cold Creek Farms*, 947 F. Supp. 197, 200 (E.D. N.C. 1996). The primary purpose of the PSA was "to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." H.R. Rep. No. 85-1048 at p.1 (1958) *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. At the time of enactment, the chief evil Congress feared was the monopoly of the packers. *Stafford*, 258 U.S. at 514-15, 42 S. Ct. at 401. The Act "was aimed at halting 'a general course of action for the purpose of destroying competition.'" *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968) (quoting House Report No. 1297, 66th Cong. 3d Sess. (1921), p. 11).

Relying upon the PSA's antitrust ancestry, several courts have held that only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA. *See Farrow v. Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976); *Armour & Co.*, 402 F.2d at 722-23; *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002); *Cold Creek Farm*, 947 F. Supp. at 200; *see also Philson v. Goldsboro Milling Co.*, 164 F.3d 625,

No. 96-2542, 96-2631, 1998 WL 709324, at *4 (4th Cir. Oct. 5, 1998) (finding that the district court did not err in instructing the jury that the plaintiffs were required to prove that the defendants' conduct was likely to adversely affect competition in order to prevail on their claims under the PSA and noting that the plaintiff must establish that the challenged act is *likely* to produce the type of injury that the Act was designed to prevent). *But see Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1454-55 (9th Cir. 1988); *Wilson & Co. v. Benson*, 286 F.2d 891, 895-96 (7th Cir. 1961).[5] We join those circuits that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition.

The *Armour* decision is instructive on this issue. In *Armour*, the Seventh Circuit considered the legislative history of the PSA and noted its antitrust roots. The court inferred that the PSA might be broader than antecedent antitrust legislation, but found that "there [was] no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers." 402 F.2d at 722. The court reasoned:

> Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the

---

[5]The Londons and the Government rely on *Wilson* for their contention that Section 202(a) does not require an adverse effect on competition. However, as the district court noted, *Wilson* did not abdicate the need for a competitive injury. The *Armour* court held that "the *Wilson* case does not support the . . . view that neither intent nor some kind of competitive injury is necessary for the operation of Section 202(a)." *Armour*, 402 F.2d at 718.

> Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic. However, in Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.

Id.

Recognizing that Section 202(a) "authorize[s] the Secretary of Agriculture to regulate anticompetitive trade practices in the livestock and meat industry," the Eighth Circuit held that "[a] practice is 'unfair' . . . if it injures or is likely to injure competition." *Farrow*, 760 F.2d at 214. Similarly, the Ninth Circuit has held that, at the very least, Section 202(a) requires "a reasonable likelihood that . . . the result [of a practice] will be an undue restraint of competition." *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980). The Fourth Circuit likewise has held that a Section 202(a) plaintiff must establish at least "the likelihood that an arrangement will result in competitive injury." *Philson v. Goldsboro Milling Co.*, 1998 WL 709324, at *4 (quotation omitted).

Policy considerations also weigh in our decision-making. We note that elimination of a competitive impact requirement would subvert the policy justifications for the PSA's adoption. As the *Armour* court noted, the main Congressional motivation for the PSA's passage was the need for "specialized regulation of the many-tiered packing industry, with its unique problems." *Armour*, 402 F.2d at 721. Thus, Congress selected the Secretary as overseer, but established some restrictions with regard to the Secretary's authority. "Congress gave the Secretary no mandate to ignore the general

outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged." *Id.* at 722. Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised.

Moreover, we do not give *Chevron*[6] deference to the Secretary's interpretation of Section 202(a). This court gives *Chevron* deference to agency interpretations of regulations promulgated pursuant to congressional authority. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123, 108 S. Ct. 413, 421 (1987). The PSA does not delegate authority to the Secretary to adjudicate alleged violations of Section 202 by live poultry dealers. *See* 7 U.S.C. § 193(a). Congress left that task exclusively to the federal courts. *See Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456-57 (8th Cir. 1995). The absence of such delegation compels courts to afford no *Chevron* deference to the Secretary's construction of Section 202(a). *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 2171 (2001) (stating that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). Because Congress plainly intended to prohibit "only those unfair, discriminatory or deceptive practices adversely affecting competition," *see Philson*, 947 F.

---

[6]*Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 6 S. Ct. 2778 (1984).

Supp. at 200, a contrary interpretation of Section 202(a) deserves no deference. *See Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002) ("No deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted."), *cert. denied*, 539 U.S. 970, 123 S. Ct. 2641 (2003).[7]

In conclusion, we hold that in order to prevail under the PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition.[8] Therefore, the district court

---

[7]We note that the Government contends that the Secretary "has consistently interpreted the [PSA] to prohibit all unfair practices, regardless of whether those practices cause a competitive injury." Gov't. Brief p. 10. In support of this "consistent view," the Government relies on one agency decision: *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336 (1990). We do not consider one agency decision to establish a "consistent view;" rather, this one agency decision only supports the Government's litigating position.

[8]We decline to adopt a disjunctive test for proving Section 202(a) violations: anticompetitive injury or predatory intent. We decline such a test because the Londons failed to preserve the question of predatory intent for appellate review. They did not argue in the district court that their case was a special circumstances case from which predatory intent could be inferred. Because the question of predatory intent was not preserved for appeal, we deem it to be abandoned. *See Rogero v. B.M. Noone*, 704 F.2d 518, 520 n.1 (11th Cir. 1983). However, assuming *arguendo* that we did adopt a disjunctive test for proving Section 202(a) violations, the Londons still would not prevail in this case. At trial, they did not present any evidence of Fieldale's alleged predatory intent in terminating

properly granted Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim because the Londons did not present any evidence at trial that Fieldale's termination of their grower contracts adversely affected or was likely to adversely affect competition. The Londons did not present any evidence as to the total number of chicken growers or buyers in the north Georgia area. The Londons did not present any evidence regarding the percentage of the chicken market Fieldale controlled. Furthermore, the Londons did not present any evidence of their or Fieldale's relative stature within the chicken industry. Accordingly, we affirm the district court's order granting Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim.[9]

---

the grower contracts.

[9]The Londons based their claim on their contention that Fieldale wrongfully terminated their contract because Harold testified in a race discrimination case against Fieldale. From this, the Londons asserted that the jury could infer an anticompetitive effect; i.e., the growers would not complain about any adverse Fieldale business practice for fear that Fieldale would terminate their contracts. For the reasons stated in our opinion, the district court properly granted summary judgment on the Londons' retaliation claim. They did not present any evidence that Fieldale retaliated against them after Harold testified in the discrimination lawsuit. Because the Londons did not present any evidence to support their claim of retaliation, the jury could not infer that such a deceptive, unfair practice (termination of contracts in retaliation for Harold's testimony) had an anticompetitive effect.

2. Judgment as a Matter of Law was proper on state law claims.

The Londons claimed that Fieldale breached the broiler contracts by providing poor quality and sick birds, failing to weigh the chickens accurately, and failing to provide sufficient medication and vaccinations for the flocks. The Londons did not support their claim with any reference to a specific contract provision that they allege Fieldale breached. At the close of the Londons' case, the district court granted Fieldale's motion for judgment as a matter of law on the breach of contract claim. The district court did not err in so ruling. The broiler contracts only obligated Fieldale to provide to the grower the "necessary feed, vaccines, medications, and boot wash supplies" for raising the birds to processing age. [Plaintiff's Ex. 36]. Contrary to the Londons' assertion, Fieldale did not have a specific contractual duty to vaccinate the birds for gumboro prior to delivery. In sum, as the district court found, the Londons did not present any evidence to support their breach of contract claim. [R. Vol. 8 p. 468].

The Londons alleged that Fieldale supplied them with settlement statements that Fieldale knew to be false, and they relied on those statements in accepting the sums Fieldale paid for the broilers. The Londons claimed they were damaged as a result of their reliance on these false settlement statements. At the close of the Londons' case, the district court granted Fieldale's motion for judgment as a matter of law on the Londons' fraud claim. The district court correctly found that there was no evidence of an affirmative act or injury to support the Londons' fraud claim. Furthermore, the Londons proffered no evidence from which a jury could calculate any alleged loss with reasonable certainty. *See Brooks v. Dime Saving Bank of New York*, 457 S.E. 2d 706, 708 (Ga. Ct. App. 1995) (stating that a plaintiff must show that he has been damaged and he must "establish the amount of [his] damages by providing the factfinder with evidence from which it can calculate the amount

of loss with reasonable certainty"). Accordingly, the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' state law breach of contract and fraud claims.

3. Summary Judgment was proper on PSA retaliation claim.

The Londons argue that the district court improperly granted Fieldale's motion for summary judgment on their PSA retaliation claim. The Londons contend that they presented sufficient evidence from which a jury could infer that because of Harold's adverse testimony in the racial discrimination case, Fieldale retaliated against the Londons by terminating their grower contracts. The Londons claim that they presented evidence that their flock performance was average prior to Harold's testimony; that after his testimony, their flock supervisors became increasingly critical on their service reports; that the Londons' chick quality declined and Fieldale delivered sick birds; and that the Londons were not Fieldale's worse performing growers when Fieldale terminated their contracts.

The district court did not err in granting summary judgment on the Londons' PSA retaliation claim. The Londons failed to provide any evidence of causation: that Fieldale terminated their contracts *because of* Harold's testimony in the racial discrimination. First the evidence shows that for the flocks where the ages of the supplying hens are available, all of the Londons' chicks came from hens between 26 and 66 weeks old, which is within industry age standards. Thus, the Londons had no evidence to support their assertion that Fieldale was purposefully supplying them with substandard chicks. Moreover, the Londons failed to show that they were singled out to receive poor chicks as a form of retaliation. *See Philson*, 947 F. Supp. at 201-02 (noting that providing low quality birds can violate the PSA when it is done for an illegal reason, but

requiring some proof that the illegal reason was the motivation behind the decision to supply the substandard birds).

Second, the evidence shows that the Londons' production declined significantly in 1997 and 1998. Of their 35 flocks in that time period, only nine were above average. Thus, the Londons' below average flocks during that time frame support Fieldale's assertion that it terminated the contract with the Londons due to sub-standard performance. In sum, the Londons did not present any evidence showing a causal connection between the contract termination and Harold London's testimony. Hence, the district court did not err in granting Fieldale's motion for summary judgment on the Londons' PSA retaliation claim.

4. Summary Judgment was proper on PSA misweighing claims.

The Londons argue that the district court erred in granting summary judgment to Fieldale on their misweighing claims for the loss of fuel weight in transit of the birds from their Green Meadows No. 1 Farm and their Green Meadows No. 2 Farm. The two contracts that cover these farms both provided that the weighing procedure would not include any adjustment for vehicle fuel used during transportation. The Londons do not provide any case law to indicate that two contracting parties would violate the PSA by inserting a provision regarding whether fuel usage would be considered during the weighing process. Instead, they rely on a regulation promulgated by the Grain, Inspection, and Packers and Stockyards Administration, pursuant to the PSA, that requires that poultry growers be paid based on the actual weight of the live poultry. *See* 9 C.F.R. § 201.55.

Congress passed the PSA to protect farmers and growers, but Congress did not intend for the PSA to supplant the "traditional principles of freedom of contract." *Jackson*, 53 F.3d at 1458. The Londons presented no evidence that they did

not enter into these contract voluntarily, and throughout most of their growing relationship with Fieldale, the Londons never complained about the weighing of the birds. Moreover, we find the Londons' reliance on the regulation to be unavailing because that section notes that any adjustment to the actual weight shall be explained on any statements. Fieldale did just that: it inserted contractual provisions in their grower contracts informing the Londons that no fuel adjustment would be made at weigh-in. Accordingly, the district court properly granted summary judgment to Fieldale on the Londons' fuel adjustment claims on their grower contracts for the Green Meadows Farms.

CONCLUSION

In deciding the question whether Section 202(a) of the PSA requires a showing of anti-competitive effect, we are guided by the PSA's antitrust ancestry, case law, and policy considerations in holding that in order to prevail under the PSA, a plaintiff must show that the defendant's "unfair, unjustly discriminatory, or deceptive practices" either had an adverse economic impact or were likely to produce an adverse economic impact. To hold otherwise would subvert the purpose of the PSA. Accordingly, we affirm the district court's order granting judgment as a matter of law on the Londons' PSA termination claim. We also affirm the district court's orders granting judgment as a matter of law to Fieldale on the Londons' state law claims, and granting summary judgment to Fieldale on the Londons' PSA retaliation and misweighing claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

HAROLD BRUCE LONDON and
CHRISTINE SAUNDERS LONDON,

Plaintiffs,

vs. Civil No. 2:01-CV-202-WCO

FIELDALE FARMS CORP.,

Defendant.

ORDER

The captioned case is before the court for consideration of defendant's renewed motion for judgment as a matter of law or, in the alternative, for a new trial. [69-1].

I. Procedural History

Plaintiffs brought several federal claims pursuant to the Packers and Stockyards Act, 7 U.S.C. §§ 181 -229a (2003) ("PSA"), and state claims alleging breach of contract and fraud. The court granted in part defendant's motion for summary judgment, and the surviving claims were presented to a jury during a four-day trial. At the close of plaintiffs' evidence, defendant made a motion for judgment as a matter of law. It contended that plaintiffs had failed to present sufficient evidence as to their PSA wet bird claims, their PSA fuel adjustment claims, their PSA termination claim, and each of their state law claims. The court granted the motion in part, holding defendant was entitled to judgment as a matter of law on any PSA wet bird claim that arose prior to November 20, 1997, on each PSA fuel adjustment claim except for those

related to the J.W. Peck farm, and on each of the state claims. The court reserved ruling on the PSA termination claim. After the close of the evidence, defendant renewed its motion for judgment as a matter of law as to the post-November 20, 1997 wet bird claims, the J.W. Peck fuel adjustment claims, and the PSA termination claim. The court denied that motion, again reserving consideration of the motion as to the PSA termination claim. The jury returned a verdict for the plaintiffs, awarding damages in the amount of $164,000.00 on the PSA termination claim and $257.00 on the improper weighing claims.

II. Judgment As a Matter of Law

The Federal Rules of Civil Procedure allow a court to grant a motion for judgment as a matter of law if, after a party has been fully heard on an issue, "there is no legally sufficient basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). When a party raises a purely legal question, the court reviews the issue *de novo*. *Morro v. City of Birmingham*, 117 F.3d 508, 513 (11th Cir.1997). However, when a party challenges only the sufficiency of the evidence used to support a claim, the court construes the evidence "in the light most favorable to, and with all reasonable inferences drawn in favor of, the nonmoving party." *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1555 (11th Cir.1995).

As to the assertions of error regarding the wet bird and fuel adjustment claims, the court denies defendant's renewed request for judgment as a matter of law for the reasons articulated when the motion was first raised during trial. The portion of the motion related to the termination claim requires a more detailed analysis, which is why the court deferred ruling until after the jury verdict. In essence, plaintiffs argued that they were terminated without sufficient economic justification in violation of 7 U.S.C. §§ 192(a) and (b). Section 192(a) prohibits packers from engaging in or using any "unfair,

unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 192(b) prohibits packers from subjecting "any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 7 U.S.C. § 192(b). Defendant contends that plaintiffs' termination claim cannot survive because they failed to show that the termination had an adverse effect on competition, which defendant alleges is a prerequisite to a claim under the PSA.

When Congress passed the PSA in 1921, the "chief evil feared [was] the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). As a result, courts have held that "only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act." *Philson v. Cold Creek Farms*, 947 F.Supp. 197, 200 (E.D.N.C. 1996) (citing cases from the Seventh, Eighth, and Ninth Circuits). Plaintiffs put forth two cases in support of the proposition that a practice could violate sections 192(a) and (b) even if it did not adversely affect competition. *See Spencer Livestock Com. Co. v. Dep't of Agric.*, 841 F.2d 1451, 1454 (9th Cir.1988); *Wilson & Co. v. Benson*, 286 F.2d 891, 895-96 (7th Cir.1961). The Seventh Circuit later clarified its position on this matter, holding that *Wilson & Co.* did not abdicate the need for a competitive injury. *Armour & Co. v. United States*, 402 F.2d 712, 722-23 (7th Cir.1968). To the extent that the *Spencer* court would permit a finding of a violation of the PSA without an effect on competition, the court finds it unpersuasive in light of the substantial caselaw to the contrary. *Farrow v. Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir.1985); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir.1976); *Armour & Co.*, 402 F.2d at 722-23; *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002); *Cold Creek Farms*, 947

F. Supp. at 200. Accordingly, plaintiffs can only recover for those practices that had an adverse effect on competition.

As a matter of law, the court finds that termination without economic justification could have an adverse effect on competition. *Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 706-06 (M.D. Fla.1990), *aff'd mem.*, 925 F.2d 1474 (11th Cir.1991). In *Baldree*, the court was addressing a motion for a preliminary injunction and found that plaintiffs had a substantial likelihood of prevailing on their claim that they were terminated without economic justification, in violation of sections 192(a) and (b). The Fourth Circuit addressed a similar situation in an unpublished decision. *See Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 1998 WL 709324 (4th Cir. Oct. 5, 1998). In *Goldsboro Milling Co.*, the court held that the trial court did not err in refusing to instruct the jury that termination without economic justification would be a per se violation of section 192(a). *Id.* at *4. Rather, the court held that whether such a practice constituted an unjust or unfair practice was appropriately left to the jury to decide. *Id.* at *4-5. Because the ability to arbitrarily refuse to do business with a particular entity is a strong indicator of a monopolistic enterprise, this court agrees with those courts that have found that termination without economic justification could have an adverse effect on competition and therefore could violate the PSA.

As the Federal Circuit so succinctly noted, "the trial judge engages in a two step process when presented a motion for JNOV: (1) determine what facts are supported by substantial evidence; and (2) determine whether those facts support the legal conclusion necessarily drawn by the jury enroute to its verdict." *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed. Cir. 1984). Because the parties presented conflicting theories as to why plaintiffs were terminated, the court easily concludes that there was sufficient evidence to support a jury finding that the termination was without economic justification. Accordingly, the real question is

whether that fact supports the legal conclusion that the termination without economic justification had an adverse impact on competition.

The court begins by noting the evidence that was not presented. There was no evidence as to the total number of chicken growers or chicken buyers in the north Georgia area. There was no evidence as to what percentage of the market defendant controlled or what percentage of defendant's chickens were grown by plaintiffs. In short, the parties did nothing to show plaintiffs' or defendant's relative stature within the chicken industry. The relevance of that information seems self-evident; if defendant was the only buyer in town, its decision to terminate without economic justification would have a greater impact on competition than if there were a multitude of buyers to choose from. The evidence that plaintiffs did present was that they were unable to obtain contracts from any other buyers because their chicken houses were in separate locations and because the houses were of "post" construction. The logical inference from that evidence is that if plaintiffs had better breeder houses, they would have been able to obtain grower contracts from other buyers.

At the end of the evidence, the jury was left with nothing more than the allegation, which they believed, that plaintiffs were terminated without economic justification. If that alone were sufficient to support a finding that the termination had an adverse effect on competition, then the court would in essence be creating a per se rule that termination without economic justification violates the PSA. Although its unpublished decision is certainly not binding, the court agrees with the Fourth Circuit's holding that such a termination is not a per se violation of the PSA. *See Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 1998 WL 709324, at *4 (4th Cir. Oct. 5, 1998). Although the court gives much deference to the jury's findings, they must be rejected when there is simply no evidence as to a necessary legal element. Because plaintiffs

presented no evidence as to the competitive effects that would result from the termination without economic justification, defendant is entitled to judgment as a matter of law.

Finally, defendant argues that plaintiffs' damages expert did not provide sufficient evidence to support any of the awards that the jury returned. The court finds that while some of the expert's conclusions were questionable, those concerns more appropriately affect the weight one would give to his testimony and not its legal sufficiency. The jury obviously agreed with much of what plaintiffs' expert had to say, and the court will not intrude upon their right to make those factual decisions.

In conclusion, the court grants defendant's motion for judgment as a matter of law as to the termination claim and denies the motion as to the fuel adjustment and wet bird claims. The jury award is adjusted to $257.00, the amount awarded on the improper weighing claims.

III. New Trial

Rule 50(c) requires the court to also rule on a motion for a new trial whenever it grants a motion for judgment as a matter of law.[1] Fed. R. Civ. P. 50(c)(1). This provision ensures that there will be a ruling on the motion for a new trial in the event that the judgment is later vacated or reversed. *Id.* "A court may grant a motion for new trial when the verdict is against the clear weight of the evidence, when the damages are excessive, or when the court determines that the trial was not fair." *Hall v.*

---

[1]It should be noted that neither party specifically discussed the standards that govern a motion for a new trial, nor did they attempt to apply the facts of this case to those standards. However, defendant styled its motion as one seeking judgment as a matter of law or, in the alternative, a new trial. Accordingly, the court will address whether defendant is entitled to a new trial.

Norfolk S. Ry. Co., 829 F. Supp. 1571, 1578 (N.D. Ga. 1993) (Shoob, J.) (citation omitted). There is a significant difference between the standard a court uses to evaluate a motion for judgment as a matter of law and that which governs a motion for a new trial. When deciding a motion for judgment as a matter of law, the court does not exercise discretion; rather, it answers the purely legal question of whether the evidence, when viewed in the light most favorable to the non-moving party, affords substantial support for the verdict. *Nat'l Car Rental Sys., Inc. v. Better Monkey Grip Co.*, 511 F.2d 724, 730-31 (5th Cir.1975). In ruling on a motion for a new trial, a court can and should exercise discretion to determine whether the verdict is against the clear weight of the evidence or would result in a miscarriage of justice, even if there is sufficient evidentiary support to preclude judgment as a matter of law. *Id.*

Should the Eleventh Circuit Court of Appeals decide that the evidence in this case is sufficient to support the jury's finding that plaintiffs were terminated without economic justification, and that such a termination violates the PSA, defendant would not be entitled to a new trial. Assuming the jury's verdict passes legal muster, the clear weight of the evidence does not swing so far in either direction to warrant a new trial. There are no equitable concerns that would lead the court to believe that the verdict, if left in place, would result in a miscarriage of justice. The damage award is supported by the testimony of plaintiffs' expert, and it is not excessive. In conclusion, the court has no reason to question the fairness of the trial. Accordingly, defendant's motion for a new trial is denied.

IV. Conclusion

In conclusion, defendant's motion for judgment as a matter of law [69-1] is **GRANTED IN PART** and **DENIED IN PART**. It is granted as to the termination claim and denied as to the improper weighing claims. Defendant's motion for a

new trial [69-2] is **DENIED**. The stay entered pending the court's ruling on the motion for judgment as a matter of law is **VACATED**. The clerk is directed to **VACATE** the original judgment and enter judgment for the plaintiffs in the amount of $257.00.

IT IS SO ORDERED, this 22nd day of December, 2003.

/s/
William C. O'Kelley
Senior United States District Judge

2

Supreme Court, U.S.
FILED
OCT 28 2005
OFFICE OF THE CLERK

No. 05-411

IN THE

Supreme Court of the United States

HAROLD BRUCE LONDON AND
CHRISTINE SAUNDERS LONDON,

Petitioners,

v.

FIELDALE FARMS CORPORATION,

Respondent.

On Petition for a Writ of Ceriorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEVEN P. GILLIAM *
R. BRENT HATCHER, JR.
SMITH, GILLIAM, WILLIAMS,
& MILES, P.A.
200 Old Coca-Cola Building
301 Green Street, N.W.
P.O. Box 1098
Gainesville, GA 30503
(770) 536-3381

Counsel for Respondent

October 28, 2005

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Eleventh Circuit correctly held—in a decision consistent with this Court's precedents and those of other federal courts of appeals—that a claim under Section 202(a) of the Packers and Stockyards Act requires proof of an adverse impact on competition.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are listed in the caption of the case.

Pursuant to Supreme Court Rule 29.6, Respondent Fieldale Farms states that it has no parent corporations and no publicly held company owns more than 10% of Respondent's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. THERE IS NO DECISIONAL CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS REVIEW BY THIS COURT	6
A. The Eleventh Circuit's Holding Is In Line With The Overwhelming Majority Of Federal Courts That Have Directly Addressed The Question Presented	6
B. There Is No Ninth Circuit Authority That Conflicts With The Eleventh Circuit's Decision	8
C. There Is No Tenth Circuit Authority That Conflicts With The Eleventh Circuit's Decision	10
II. PETITIONERS WAIVED AN ISSUE OF LAW CRITICAL TO THIS COURT'S REVIEW OF THE ISSUE PRESENTED	12
III. PETITIONERS COULD NOT PREVAIL UNDER ANY LEGAL STANDARD	13
IV. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS	14
V. THIS COURT SHOULD REJECT PETITIONERS' REQUEST FOR ERROR CORRECTION IN THE ELEVENTH CIRCUIT'S APPLICATION OF *CHEVRON*	15

TABLE OF CONTENTS--continued

Page

VI. THERE IS NO COMPELLING REASON TO GRANT IMMEDIATE REVIEW OF THIS ISSUE 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES Page

Armour & Co. v. *United States*, 402 F.2d 712 (7th Cir. 1968) 6, 14, 15, 17
Blackfoot Livestock Comm'n Co. v. *Dep't of Agric.*, 810 F.2d 916 (9th Cir. 1987) 9
Bruhn's Freezer Meats v. *United States Dep't of Agric.*, 438 F.2d 1332 (8th Cir. 1971) 14
Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 15
Crandon v. *United States*, 494 U.S. 152 (1990) 14
DeJong Packing Co. v. *United States Dep't of Agric.*, 618 F.2d 1329 (9th Cir. 1980) 7, 9, 14, 17
FDIC v. *McSweeney*, 976 F.2d 532 (9th Cir. 1992) 9
Farrow v. *United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985) 7, 14, 17
Griffin v. *Smithfield Foods, Inc.*, 183 F. Supp. 2d 824 (E.D. Va. 2002) 7, 15
Hays Livestock Comm'n Co. v. *Maly Livestock Comm'n Co.*, 498 F.2d 925 (10th Cir. 1974) 10, 11
IBP, Inc. v. *Glickman*, 187 F.3d 974 (8th Cir. 1999) 7, 17
Jackson v. *Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995) 14
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 14
Landreth v. *Commissioner*, 859 F.2d 643 (9th Cir. 1988) 9
London v. *Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005) 15
Pac. Trading Co. v. *Wilson & Co.*, 547 F.2d 367 (7th Cir. 1976) 6, 14, 17
Peterman v. *USDA*, 770 F.2d 888 (10th Cir. 1985) 10, 11

TABLE OF AUTHORITIES—continued

Page

Philson v. *Cold Creek Farms*, 947 F. Supp. 197 (E.D.N.C. 1996) 7, 15
Philson v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998), *available at* 1998 WL 709324 ... 7
Sebastopol Meat Co. v. *Sec'y of Agric.*, 440 F.2d 983 (9th Cir. 1971) 10
Spencer Livestock Comm'n Co. v. *Dep't of Agric.*, 841 F.2d 1451 (9th Cir. 1988) 8
Stafford v. *Wallace*, 258 U.S. 495 (1922) 15
Swift & Co. v. *United States*, 308 F.2d 849 (1962) 6, 17
Swift & Co. v. *Wallace*, 105 F.2d 848 (7th Cir. 1939) 6
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 16
Watt v. *Alaska*, 451 U.S. 259 (1981) 6, 14
Wilson & Co. v. *Benson*, 286 F.2d 891 (7th Cir. 1961) 6, 17

STATUTES

7 U.S.C. § 181 *et seq.* 2
§ 192 ..... 6, 8
§ 213 ..... 8, 11
Ga. Code Ann. § 2-22-2 17

RULE

Sup. Ct. R. 10 4

ADMINISTRATIVE DECISION

Corn State Meat Co., 45 Agric. Dec. 995 (1986) 16
IBP, inc., 57 Agric. Dec. 1353 (1998), *reversed on other grounds sub nom. IBP, Inc.* v. *Glickman*, 187 F.3d 974 (8th Cir. 1999) 16

Respondent Fieldale Farms Corporation ("Fieldale") respectfully requests that this Court deny the petition for certiorari filed in this case.

STATEMENT OF THE CASE

Fieldale is an integrated poultry company that owns various feed mills, hatcheries, and processing plants. Fieldale's processing operations emanate from a business paradigm known as "'contract farming.'" Pet. App. 2a. Under this business model, Fieldale enters into contracts with "grower[s]," pursuant to which Fieldale provides the growers with baby chicks (known as "broilers") as well as the feed and medication necessary for successful growth. In return, the growers are responsible for providing care, housing, and a humane environment for the broilers during the full term of the growth cycle, which normally lasts from 40-49 days—a period known as the "grow-out." *Id.* at 2a-3a.

Fieldale compensates its growers based on a formula that takes into account the weight of the birds upon their arrival at the plant and the feed consumed by the birds during the grow-out. Pet. App. 3a. The formula enables Fieldale to compare its growers based upon the cost of producing finished broilers. This comparison, in turn, determines the relative performance of the individual growers. In sum, growers who are the most cost efficient receive a higher per-pound rate than those growers who cost Fieldale more money in feed and medicine. *Id.*

From 1979 through 1995, Harold London was employed at various poultry companies as a broiler flock supervisor and broiler manager. Pet. App. 2a. In or about 1990, Mr. London began working for Fieldale as a broiler serviceman. After Mr. London commenced employment with Fieldale, Petitioners (Mr. London and his wife Christine) began contract farming

for Fieldale. Fieldale terminated Mr. London's employment in 1995.[1] *Id.*

After Mr. London's termination, Petitioners continued to grow broilers for Fieldale in accordance with three contracts. Pet. App. 2a-3a. Under the terms of the contracts, Fieldale agreed to place chickens on Petitioners' broiler farms and provide the feed and medication necessary for a successful grow-out. Petitioners agreed to raise the birds in accordance with accepted poultry industry standards, and in conformity with Fieldale's criteria. The contracts allowed Fieldale to terminate on seven-days notice if continuing the contractual relationship would have detrimental effects on Fieldale's business. *Id.* at 3a.

Fieldale monitored Petitioners' performance by appointing a "flock supervisor" to the various farms. Pet. App. 4a. The flock supervisor served as the primary overseer on behalf of Fieldale over Petitioners' operations, and he would communicate growing instructions and suggestions to Petitioners both orally and in writing. Fieldale also required the flock supervisors to document any problems they found on the grower farms that endangered the broilers' welfare. *Id.* As memorialized by flock supervisor reports, Petitioners' growing performance was substandard. *Id.* at 19a. Petitioners' production declined significantly in 1997 and 1998. Of 35 flocks in that time period, only nine were above average. *Id.* After the flock supervisor issued Petitioners warnings regarding their performance, Fieldale elected to cease supplying birds to Petitioners, thereby terminating their contractual relationship. *Id.* at 4a.

On November 20, 2001, Petitioners filed suit against Fieldale alleging, *inter alia*, that the termination of their grower contracts violated the Packers and Stockyards Act, 7

---

[1] Mr. London's employment termination is not relevant to the underlying claims and was not raised as a factual predicate for any cause of action asserted by Petitioners.

U.S.C. § 181 *et seq.*, ("PSA") because Fieldale's actions lacked economic justification and were in retaliation for testimony that Harold provided against Fieldale in a race discrimination lawsuit. Petitioners also asserted PSA misweighing claims, as well as state law claims for breach of contract and fraud. After discovery, Fieldale filed a motion for summary judgment. The district court granted summary judgment on the issue of whether Fieldale retaliated against Petitioners for Mr. London's testimony.[2] Pet. App. 5a. The motion was also granted on a number of Petitioners' misweighing claims. *Id.*

The balance of Petitioners' misweighing (and certain fuel adjustment) claims proceeded to trial, along with the issue of whether Fieldale violated Section 202(a) of the PSA by terminating Petitioners' contracts without economic justification. Pet. App. 5a. After Petitioners presented their case, Fieldale moved for judgment as a matter of law on all claims. The district court granted Fieldale's motion on Petitioners' state law claims and on certain PSA misweighing and fuel adjustment claims. The district court reserved ruling on the PSA termination claim. At the close of the evidence, Fieldale renewed its motion for judgment as a matter of law. The district court denied the motion, again reserving consideration of Petitioners' PSA termination claim. *Id.* at 6a.

The jury returned a verdict in Petitioners' favor on their PSA termination claim and awarded them $164,000.00.[3] After trial, Fieldale filed a renewed motion for judgment as a

---

[2] Petitioners continue to assert that Fieldale supplied them with substandard birds in "retaliation" for "adverse" deposition testimony given by Mr. London. Pet. 3, 5. They do not seek certiorari on that issue and the assertion is without merit. As noted by the Eleventh Circuit, Petitioners presented no evidence that Fieldale took such action in response to the testimony given by Mr. London. Pet. App. 16a n.9.

[3] The jury also returned a verdict in Petitioners' favor on a "wet bird" misweighing claim, awarding them $225.00, and on a fuel adjustment claim, awarding them $32.00. Pet. App. 6a.

matter of law and, in the alternative, a motion for a new trial. The district court granted Fieldale's renewed motion for judgment as a matter of law on Petitioners' PSA termination claim, setting aside the $164,000.00 jury award. Pet. App. 6a. In its order, the district court, citing "substantial caselaw" to support its conclusion, held that to prevail on this Section 202(a) claim, Petitioners were required to demonstrate that Fieldale's actions had an adverse effect on competition. *Id.* at 23a-24a.

The Eleventh Circuit affirmed the district court's rulings *in toto*. Pet. App. 1a-20a. The Eleventh Circuit held that a Section 202(a) plaintiff "must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." *Id.* at 15a.

Although the Eleventh Circuit held that Petitioners were required to prove an anticompetitive effect to prevail under Section 202(a), this holding was driven in part by Petitioners' failure to preserve predatory intent as an alternative basis for imposing liability under Section 202(a). See Pet. App. 15a n.8. Thus, the court of appeals did not hold that anticompetitive effects must always be proven in every case brought under Section 202(a); it left that issue for another day in a case where the issue of intent was preserved. See *id.*

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for several reasons.

First, Petitioners' proclamation of a "longstanding" conflict among the circuits on the specific PSA issue adjudicated by the Eleventh Circuit is simply baseless. A review of the authority cited by Petitioners as support for their alleged "conflict" reveals, in actuality, that *no conflict* exists among the circuit courts, much less one that is "longstanding." As a result, the petition does not meet any of the established criteria warranting certiorari. See Sup. Ct. R. 10.

Second, Petitioners' obsessive focus on the competitive effects portion of the holding below conveniently ignores footnote 8 of the court of appeals' opinion, which clearly indicates that the holding below arises in a deficient posture. The court of appeals recognized that it might be possible to prove a claim under section 202(a) without proving anticompetitive effect on the relevant market if the plaintiff proved predatory intent on the part of the defendant. See Pet. App. 15a n.8. But in this case that issue was waived. See *id.* Thus, contrary to Petitioners' assertion, this case is a woefully inadequate vehicle because the logical disjunctive standard for liability is not available for this Court's consideration. The Court clearly should wait for a case where both effects and intent are properly preserved to decide the scope of Section 202(a).

Third, even if there were a conflict in the circuits on a decisional point of law and Petitioners had not waived a critical issue, certiorari should be denied because, as the Eleventh Circuit expressly stated, Petitioners failed to present sufficient evidence to support their claim under any legal standard. See Pet. App. 15a n.8 (noting that Petitioners did not present any evidence of predatory intent), & 16a n.9 (noting that Petitioners' PSA claims for retaliation and wrongful termination are entirely based on an allegation that Fieldale wrongfully terminated Petitioners' contracts because Harold gave testimony against Fieldale in another case, but that Petitioners failed to "present any evidence that Fieldale retaliated against them after Harold testified"). As a result of this failure of proof, Petitioners could not prevail under any formulation of the governing legal standard

Fourth, Petitioners' attack on the merits of the Eleventh Circuit's decision is both irrelevant and incorrect. Undeterred by the absence of a conflict, Petitioners attack the merits of the Eleventh Circuit's decision, devoting a substantial portion of their petition to this theme in hopes of procuring the proverbial "second bite" (actually a third bite in this case). But

such an attempt at error correction provides no basis for a grant of *certiorari*. See *Watt* v. *Alaska*, 451 U.S. 259, 275 (1981) ("Most certainly, this Court does not sit primarily to correct what [it] perceive[s] to be mistakes committed by other tribunals.") (Stevens, J., concurring). Moreover, Petitioners' substantive attack on the decision below cannot withstand scrutiny.

I. THERE IS NO DECISIONAL CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS REVIEW BY THIS COURT.

A. The Eleventh Circuit's Holding Is In Line With The Overwhelming Majority Of Federal Courts That Have Directly Addressed The Question Presented.

The Eleventh Circuit correctly held that "in order to prevail under the PSA , a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." Pet. App. 15a. In so holding, the Eleventh Circuit joined the overwhelming majority of federal courts of appeals that have addressed this issue.

Specifically, the Seventh Circuit has held that Section 202(a) of the PSA (7 U.S.C. § 192(a)) requires "either intent or adverse competitive effect." *Armour & Co.* v. *United States*, 402 F.2d 712, 717-18 (7th Cir. 1968) (interpreting the 7th Circuit's decision in *Swift & Co.* v. *Wallace*, 105 F.2d 848 (7th Cir. 1939)); *Wilson & Co.* v. *Benson*, 286 F.2d 891 (7th Cir. 1961); *Swift & Co.* v. *United States*, 308 F.2d 849 (1962). See also *Armour*, 402 F.2d at 717 ("words such as 'unfair' and 'unjustly' in Section 202(a) ... require some examination of [a defendant's] intent and the likely effects of its acts or practices under scrutiny"); *Pac. Trading Co.* v. *Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976) ("the purpose of [the PSA] is to halt unfair business practices which adversely affect competition, not shown here").

The Eighth Circuit has also held that a Section 202(a) plaintiff must prove a competitive injury. That circuit has held that under Section 202(a) "a practice is 'unfair' ... if it injures or is likely to injure competition." *Farrow* v. *United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985). See also *IBP, Inc.* v. *Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (agreement providing for right of first refusal did not violate Section 202(a) where it did not "potentially suppress or reduce competition sufficient to be proscribed by the Act").

The Ninth Circuit, too, has held that, at the very least, Section 202(a) requires "a reasonable likelihood that ... the result [of a practice] will be an undue restraint of competition." *DeJong Packing Co.* v. *United States Dep't of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980). As the court explained, "while § 202 of the [PSA] may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation," including the requirement that "unfair" conduct must adversely affect competition to be actionable. *Id.* at 1335 n.7.

Similarly, in an unpublished decision the Fourth Circuit has held that a Section 202(a) plaintiff must establish at least "'the likelihood that an arrangement will result in competitive injury.'" *Philson* v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998) (table), *available at* 1998 WL 709324, at *4 (quoting *Farrow*, 760 F.2d at 215). This principle has been repeatedly applied by district courts within the Circuit. See *Griffin* v. *Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) ("only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act") (internal quotation marks omitted); *Philson* v. *Cold Creek Farms*, 947 F. Supp. 197, 201 (E.D.N.C. 1996) (Section 202(a) "is a general mandate against unfair acts by live poultry dealers which adversely affect competition").

It is evident, therefore, that the Eleventh Circuit's decision is plainly in line with numerous other circuits that have directly addressed the issue. As will be shown below, Petitioners' assertion regarding a circuit conflict is illusory. There is no conflict in the circuits that warrants resolution by this Court and the petition for certiorari should be denied.

B. There Is No Ninth Circuit Authority That Conflicts With The Eleventh Circuit's Decision.

Petitioners rely primarily on one decision in their effort to establish a conflict with the Ninth Circuit: *Spencer Livestock Commission Co.* v. *Department of Agriculture*, 841 F.2d 1451 (9th Cir. 1988). *Spencer* involved an appeal from an administrative ruling by the United States Department of Agriculture ("USDA") that a livestock dealer violated Section 312 of the PSA, which was subsequently codified at 7 U.S.C. § 213(a) ("Section 213").[4] Because the *Spencer* court addressed violations of Section 213(a), it had no cause to examine or interpret Section 202(a), and thus did not perform a competitive impact analysis. As such, its conclusion does not create a conflict in view of the case law in that Circuit construing Section 202(a) in a manner identical to that of the Eleventh Circuit.[5]

Specifically, in *DeJong*, the Ninth Circuit held that, at the very least, Section 202(a) requires "a reasonable likelihood that...the result [of a practice] will be an undue restraint of

---

[4] Courts have used various citation methods in discussing the provisions of the PSA. Sometimes courts refer to the PSA by citing the sections of the original Act and sometimes courts cite to the codification of those provisions in 7 U.S.C. For purposes of clarity, Section 202 of the PSA has been codified at 7 U.S.C. § 192. Section 312 of the PSA has been codified at 7 U.S.C. § 213.

[5] Tellingly, Petitioners do not (and cannot) cite any portion of *Spencer* that concludes that termination of a contract without economic justification—the action at issue in this case—amounts to a per se violation of Section 202(a).

competition." *DeJong*, 618 F.2d at 1337. In recognizing this competitive injury requirement, the court explained, the PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *Id.* at 1335 n.7. Unlike the court in *Spencer*, the *DeJong* court actually construed Section 202, and properly considered the PSA's antitrust ancestry when holding that a plaintiff must, at a minimum, show a "reasonable likelihood" that competition will be adversely affected.

Given the holding in *DeJong*, the subsequent *Spencer* decision cannot be classified as the Ninth Circuit's controlling voice on the meaning of Section 202(a). Both *DeJong* and *Spencer* were decided by three judge panels. It is well settled in the Ninth Circuit that three-judge panels are "bound by ... prior decisions interpreting state as well as federal law in the absence of intervening controlling authority." *FDIC* v. *McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992). See also *Landreth* v. *Commissioner*, 859 F.2d 643, 648 (9th Cir. 1988) (subsequent panels cannot overrule prior panels absent intervening authority). Accordingly, *Spencer* cannot and should not be stretched to deviate from the Ninth Circuit's prior construction of Section 202(a)—a construction that parallels that of the Eleventh Circuit.

In another attempt to create a circuit conflict, Petitioners cite *Blackfoot Livestock Commission Co.* v. *Department of Agriculture*, 810 F.2d 916, 922 (9th Cir. 1987) for the proposition that "the Ninth Circuit had upheld a USDA determination that check-kiting violates the PSA because it is 'deceptive.'" Pet. 8. What Petitioners fail to disclose, however, is that *Blackfoot* was also construing Section 213 when the court concluded that such action violated the PSA. See 810 F.2d at 922. ("Registered auctions are prohibited from using deceptive practices in connection with the sale of livestock.") (citing 7 U.S.C. § 213(a)). Because *Blackfoot* did not address alleged violations of Section 202, it did not cite the Ninth Circuit's prior decision in *DeJong* as controlling au-

thority and had no cause to conduct a competitive impact analysis. Therefore, *Blackfoot* is not in conflict with the Ninth Circuit's previous (and sound) interpretation of Section 202.

Finally, Petitioners cite *Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971), in a last ditch effort to generate a conflict. Petitioners claim that *Sebastopol* holds that "a failure to pay money when owed—essentially a breach of contract—violate[s] [section 202(a)]." Pet. 8. This statement is inaccurate. *Sebastopol* did *not* hold that the activity in question violated Section 202(a). Rather, the court only adjudicated the propriety of the USDA's issuance of a cease and desist order against the president of a company in his individual capacity. *Sebastopol*, 440 F.2d at 983 ("[T]he *only* issue for our consideration is the propriety of that part of the cease and desist order which runs against Singleton as an individual, as distinguished from Singleton as an officer of the corporation.") (emphasis added). As such, under any fair reading of the opinion, Petitioners' implication that the Ninth Circuit equates a "failure to pay" with a "breach of contract" is wrong. *Sebastopol* in no way negated the Ninth Circuit's previous interpretation of Section 202(a) in *DeJong*.

In sum, there is no Ninth Circuit authority that conflicts with the Eleventh Circuit's decision below. To the contrary, the law of the Ninth Circuit squarely conforms to the holding of the Eleventh Circuit in this action.

C. There Is No Tenth Circuit Authority That Conflicts With The Eleventh Circuit's Decision.

Petitioners cite two decisions as support for their assertion that the Eleventh Circuit's decision conflicts with the Tenth Circuit: *Hays Livestock Commission Co.* v. *Maly Livestock Commission Co.*, 498 F.2d 925 (10th Cir. 1974) and *Peterman* v. *USDA*, 770 F.2d 888 (10th Cir. 1985). Neither of these cases addressed the question presented to the Elev-

enth Circuit, nor did they necessitate interpretation of Section 202(a).

Hays involved the appeal of reparation orders entered against a registered and bonded livestock dealer, and a registered and bonded marketing agent. *Hays*, 498 F.2d at 927. The *Hays* court made clear at the outset of its opinion that the appeal involved only one provision of the PSA. The court stated: "These cases are predicated *on § 208*, which prohibits 'every unjust, unreasonable, or discriminatory regulation or practice' in respect to the furnishing of stockyard services." *Id.* (emphasis added). In short, *Hays* did not construe Section 202(a) and therefore clearly did not hold that a competitive injury is unnecessary to prevail under that provision.[6]

Petitioners' citation to *Peterman* is equally unavailing. The *Peterman* court affirmed an administrative decision that the defendant's "bait and switch" sales tactics were "deceptive" trade practices. The court does not, however, indicate the specific provision of the PSA that the defendant violated, so it can hardly be cited as a controlling interpretation of the meaning of Section 202(a). See *Peterman*, 770 F.2d at 888-90. Several of the PSA's provisions prohibit "deceptive" trade practices, including Section 213(a). See 7 U.S.C. § 213(a). Moreover, what is clear from *Peterman* is that the court did *not* consider or rule upon the issue presented in this case—whether Section 202(a) contains a competitive impact re-

---

[6] If anything, *Hays* lends support to the Eleventh Circuit's decision. The court recognized the primary legislative objective behind the PSA's passage—to combat monopolies. The *Hays* court stated that "the 'chief evil' sought to be prevented or corrected is monopolistic practices in the livestock industry." *Hays*, 498 F.2d at 927 (citing *Mahon* v. *Stowers*, 416 U.S. 100 (1974) and *Stafford* v. *Wallace*, 258 U.S. 495 (1922)). Additionally, the court recognized that the PSA did not prescribe unlimited duties to or unlimited powers on the Secretary of the USDA. See *Hays*, 498 F.2d at 930 ("Federal courts have been at pains to point out that the [PSA] did not make of the Secretary a collecting agency."). The court made this point to support its conclusion that the PSA was not designed to microscopically adjudicate all perceived statutory violations. *Id.*

quirement. Because the *Peterman* court did not address that issue, Petitioners cannot credibly claim that *Peterman*'s holding in any way conflicts with the Eleventh Circuit's decision. As such, Petitioners have proffered no authority from the Tenth Circuit holding that a competitive injury is not required under Section 202(a).

* * * *

Petitioners cite no authority that conflicts with the Eleventh Circuit's holding below. As a result, Petitioners have failed to establish that a conflict exists warranting certiorari. The petition should be denied.

II. PETITIONERS WAIVED AN ISSUE OF LAW CRITICAL TO THIS COURT'S REVIEW OF THE ISSUE PRESENTED.

Petitioners argue that the Eleventh Circuit erred because some plaintiffs may be able to prove a violation of Section 202(a) without proving that the defendant's conduct had an anticompetitive effect on the relevant market. See Pet. 10-16. But the Eleventh Circuit did not disagree. Rather, the court of appeals stated that it declined to adopt a disjunctive test in this case because Plaintiffs "failed to preserve the question" whether it would be sufficient for a plaintiff to show that a defendant acted with predatory intent, regardless of any anticompetitive effect that resulted from the defendant's actions. Pet. App. 15a n.8.

In fact, not only did Petitioners fail to preserve this critical legal issue, they also failed to present any evidence that could support a finding of predatory intent even if the Court were to raise the issue *sua sponte*. See Pet. App. 15a n.8 ("assuming *arguendo* that we did adopt a disjunctive test for proving Section 202(a) violations, the Londons still would not prevail .... [because at] trial they did not present any evidence of Fieldale's alleged predatory intent in terminating the grower contracts").

As a result, this case does not present the Court with an opportunity to consider whether plaintiffs can recover under Section 202(a) only if they demonstrate an anticompetitive effect on the relevant market to prove a violation of Section 202(a). Thus, even if the courts were divided on the issue presented (and they are not), this case is not an appropriate vehicle for this Court's review.

III. PETITIONERS COULD NOT PREVAIL UNDER ANY LEGAL STANDARD.

Petitioners' case suffers from another defect that renders it an inappropriate vehicle for consideration of the meaning of Section 202(a). Plaintiffs failed to present sufficient evidence to prevail under any legal standard. As the Eleventh Circuit noted, Petitioners' PSA claims are based on the theory that Fieldale retaliated against Petitioners and terminated their contracts without economic justification because Harold testified in a race discrimination lawsuit against Fieldale. See Pet. App. 4a-5a, 16a & n.9. But, the court of appeals stated that Petitioners "did not present any evidence that Fieldale retaliated against them after Harold testified in the discrimination lawsuit." *Id.* at 16a n.9. As a result, Petitioners cannot prevail in this case regardless of whether this Court were to adopt the interpretation of Section 202(a) they advance. This evidentiary failure undermines petitioners' effort to have this Court address the meaning of Section 202(a) in the context of this case.[7]

---

[7] Because the district court granted judgment as a matter of law on their PSA claims, Petitioners assert that the legal standard the lower courts applied is "indisputably outcome determinative." Pet. 23. The Eleventh Circuit's conclusion that Petitioners failed to present sufficient evidence to sustain their claims even under the theory Petitioners advance contradicts this assertion.

IV. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS.

Petitioners assert that this Court should grant certiorari "because the decision below is wrong." Pet. 10. Standing alone, this is no reason to grant certiorari. See *Watt* v. *Alaska*, 451 U.S. 259, 274-75 (1981) (Stevens, J. concurring). Moreover, although this is not the place for an extended debate over the merits, the Eleventh Circuit's decision that a Section 202(a) plaintiff must demonstrate an adverse effect on competition is indisputably correct.

When determining the meaning of a statute, this Court looks to the particular statutory language and to the design of the statute as a whole. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). See also *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). As noted above, numerous lower federal courts have concluded that Section 202(a)'s text incorporates a competitive impact requirement. The Seventh Circuit's ruling in *Armour & Co.* v. *United States*, 402 F.2d at 720, is instructive. In *Armour*, the court conducted a thorough analysis of the PSA's language, structure and purpose. The court stated:

> [s]urely words such as "unfair" and "unjustly" in Section 202(a) and "undue" and "unreasonable" in Section 202(b) *require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny.*

Id. at 717 (emphasis added).

The overwhelming majority of courts that have addressed this issue have reached the same conclusion. See *Jackson* v. *Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (quoting *Jackson* v. *Swift-Eckrich, Inc.*, 836 F. Supp. 1447, 1456 (W.D. Ark. 1993)); *Farrow*, 760 F.2d at 214; *De Jong*, 618 F.2d at 1336-37; *Pac. Trading Co.*, 547 F.2d at 369; *Bruhn's Freezer Meats* v. *United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971); *Armour*, 402 F.2d at 717;

London v. *Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005); *Griffin*, 183 F. Supp. 2d at 827; *Philson*, 947 F. Supp. at 200.

As the *Armour* court observed, the PSA's legislative history "fully supports" the conclusion that the lower federal courts have drawn from the text and structure of the PSA: *viz* that "Section 202(a) was not directed at [a practice] unless there was some intent to eliminate competition or unless the effect of the [practice] might lessen competition." *Armour*, 402 F.2d at 720. In fact, the Senate Committee Report "makes it clear that this part of the legislation was promoted primarily by *fear of monopoly and predation*." *Id.* (emphasis added) (citing S. Rep. No. 66-429, at 1, 3 (1921)). Furthermore, the House Committee noted that the Act was "aimed a halting 'a general course of action *for the purpose of destroying competition.*'" *Id.* (emphasis added) (quoting H.R. Rep. No. 66-1297, at 11 (1921)). The legislative history, therefore, fully supports this Court's observation that the PSA was passed to combat the "chief evil" of the "monopoly of the packers." *Stafford* v. *Wallace*, 258 U.S. 495, 514-15 (1922).

V. THIS COURT SHOULD REJECT PETITIONERS' REQUEST FOR ERROR CORRECTION IN THE ELEVENTH CIRCUIT'S APPLICATION OF *CHEVRON*.

Petitioners claim that the Eleventh Circuit erred by "declining to defer to USDA's interpretation of the phrase 'unfair, unjustly discriminatory, or deceptive." Pet. 16. This assertion provides no basis for granting certiorari. Petitioners do not claim (nor could they) that the Eleventh Circuit conflicts with other courts of appeal in the application of *Chevron, U.S.A, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), and it progeny.

Moreover, Petitioners' request for error correction in the Eleventh Circuit's application of *Chevron* is without merit. The intent of Congress in passing the PSA is clear, and even

if that intent were ambiguous, the USDA has never taken a consistent view that a claimant can succeed under Section 202 while failing to show an adverse effect on competition. In fact, the USDA's previous decisions applying section 202(a) have specifically inquired whether the conduct at issue caused (or was likely to cause) an anticompetitive effect. For example, in *Corn State Meat Co.*, 45 Agric. Dec. 995, 1023 (1986), cited prominently by Petitioners, the Judicial Officer held that "[s]ince commercial bribery is inherently unfair, unjustly discriminatory and deceptive, it is not necessary to show in a particular case that the commercial bribery involved caused injury or was likely to cause injury." As the Judicial Officer explained, "[c]ommercial bribery is considered unfair ... because of its actual and possible effects on competition." *Id.* at 1022. Moreover, in *IBP, inc.*, 57 Agric. Dec. 1353 (1998), *reversed on other grounds sub nom. IBP, Inc.* v. *Glickman*, 187 F.3d 974 (8th Cir. 1999), the USDA determined that an "injury to competition" *must* be proven to establish a violation of Section 202. *Id.* at 1377.

It is well settled that an agency's interpretation of a statute that conflicts with prior interpretation "is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994) (internal quotation marks omitted). The Eleventh Circuit properly applied that principle here.

VI. THERE IS NO COMPELLING REASON TO GRANT IMMEDIATE REVIEW OF THIS ISSUE.

Finally, there is no reason to believe the Eleventh Circuit's decision will have the apocalyptic public policy ramifications that Petitioners suggest.[8] See Pet. 19-23. As noted above, a

---

[8] Petitioners make much of their allegation that contract farmers lack relative bargaining power. Pet. 19-23. This extra-record discussion is both irrelevant to the petition and incorrect. In fact, the "complaints" set forth by Petitioners on behalf of growers are being addressed by the individual states. For instance, in 2004 the Georgia General Assembly

number of circuits have held that Section 202(a) requires a showing of anticompetitive effects. Many of these holdings have been the law of the relevant circuits for decades. See, *e.g.*, *Wilson & Co.*, 286 F.2d at 895; *Swift & Co.*, 308 F.2d at 853; *Armour*, 402 F.2d at 717; *Pac. Trading Co.*, 547 F.2d at 369-70; *DeJong*, 618 F.2d at 1337; *Farrow*, 760 F.2d at 214; *IBP, Inc.*, 187 F.3d at 977. Yet there is no evidence that these precedents have led to a public policy crisis. Moreover, Petitioners' claim that contract growers lack any judicial remedies outside the PSA is belied by the fact that Petitioners asserted various state law claims based on the conduct alleged in this case. See Pet. App. 17a (analyzing Petitioners' state law claims).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

STEVEN P. GILLIAM *
R. BRENT HATCHER, JR.
SMITH, GILLIAM, WILLIAMS,
& MILES, P.A.
200 Old Coca-Cola Building
301 Green Street, N.W.
P.O. Box 1098
Gainesville, GA 30503
(770) 536-3381

Counsel for Respondent

October 28, 2005

* Counsel of Record

---

enacted legislation to give growers various additional rights in the process of entering into and canceling poultry growing contracts. See Ga. Code. Ann. § 2-22-2.

3

Supreme Court, U.S.
FILED
NOV 9 - 2005
OFFICE OF THE CLERK

No. 05-411

IN THE
Supreme Court of the United States

HAROLD BRUCE LONDON and
CHRISTINE SAUNDERS LONDON,
Petitioners,
v.

FIELDALE FARMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, DC 20016
(202) 237-7543

Cynthia Noles Johnson
Post Office Box 48
Cohutta, GA 30710
(706) 694-4298

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

November 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY 1

A. Respondent Attempts To Avoid The Circuit Split By Ignoring The Well-Established Rule That Identical Language In Different Parts Of The Same Statute Should Be Given The Same Meaning. 2

B. There Is A Conflict Among The Federal Courts Of Appeals. 3

C. This Case Presents An Excellent Vehicle To Address And Resolve The Circuit Split. 6

D. Respondent Does Not Meaningfully Address The Importance Of The Question Presented, The Disruptive Effect Of The Eleventh Circuit's Failure To Defer To The USDA, Or The Merits Of The Case. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Blackfoot Livestock Comm'n Co. v. Dep't of Agric.,
810 F.2d 916 (9th Cir. 1987) 2

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 7

Comm'r of Internal Revenue v. Lundy,
516 U.S. 235 (1996) 3

De Jong Packing Co. v. USDA,
618 F.2d 1329 (9th Cir. 1980) 4, 5

Farrow v. USDA,
760 F.2d 211 (8th Cir. 1985) 6

Hays Livestock Comm'n Co., Inc. v. Maly Livestock Comm'n Co., Inc.,
498 F.2d 925 (10th Cir. 1974) 2, 6

Parchman v. USDA,
852 F.2d 858 (6th Cir. 1988) 6

Peterman v. USDA,
770 F.2d 888 (10th Cir. 1985) 2, 5

Spencer Livestock Comm'n Co. v. Dep't of Agric.,
841 F.2d 1451 (9th Cir. 1988) 1, 4, 8

Sullivan v. Stroop,
496 U.S. 478 (1990) 3

United States v. Donahue Bros.,
59 F.2d 1019 (8th Cir. 1932) 6

Utah Pie Co. v. Cont'l Baking Co.,
386 U.S. 685 (1967) 7

Van Wyk v. Bergland,
570 F.2d 701 (8th Cir. 1978) 6

Statutes

Packers and Stockyards Act § 202(a),
7 U.S.C. § 192(a) 1, 2

Packers and Stockyards Act § 307,
7 U.S.C. § 208 6

Packers and Stockyards Act § 312(a),
7 U.S.C. § 213(a) 1, 2

Legislative History

S. Rep. No. 66-429 (1920) 10

PETITIONERS' REPLY

The Brief in Opposition (BIO) attempts to explain away the conflict among the circuits concerning the scope of the Packers and Stockyards Act (PSA) by narrowing the question presented. According to respondent, the question is not the one identified by the Eleventh Circuit in the decision below—whether "only those unfair, discriminatory or deceptive practices affecting competition are prohibited by the PSA." Pet. App. 11a. Instead, respondent argues that there is no conflict among the circuit courts "on the specific PSA issue" decided by the Eleventh Circuit in this case (BIO 4), because this case was brought under § 202(a) of the PSA, 7 U.S.C. § 192(a), and some of the conflicting decisions were brought under § 312(a) of the PSA, 7 U.S.C. § 213(a). Respondent simply ignores the fact that both PSA sections use identical language to prohibit "any unfair, unjustly discriminatory, or deceptive practice or device."

Respondent also ignores the Eleventh Circuit's recognition that its decision in this case conflicts with the Ninth Circuit's conclusion that the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics." *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1455 (9th Cir. 1988); *see* Pet. App. 11-12a. Rejecting that proposition, the Eleventh Circuit chose to "join those circuits"—including the Seventh and, in the court's view, the Eighth—"that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition." Pet. App. 12a.

The conflict among the courts concerns the scope of the PSA *as a whole*. Regardless of whether a case is controlled by PSA § 202(a) or PSA § 312(a), the question presented remains: Does the PSA's prohibition of "unfair, unjustly discriminatory, or deceptive practices or acts" extend to all such practices, or

only to practices that have or are likely to have an adverse effect on competition? It is that basic question over which the circuits have divided and to which only this Court can provide a definitive answer.

A. Respondent Attempts To Avoid The Circuit Split By Ignoring The Well-Established Rule That Identical Language In Different Parts Of The Same Statute Should Be Given The Same Meaning.

Respondent suggests that "[t]here is no conflict in the circuits that warrants resolution by this Court" because some of the decisions in conflict rest on two different sections of the PSA. BIO 8. Thus, for example, respondent dismisses the conflict between the decision below and the Ninth Circuit's decision in *Spencer* solely because *Spencer* addressed violations of 7 U.S.C. § 213(a) rather than 7 U.S.C. § 192(a) (BIO 8), even though the court below did not draw such a distinction and specifically cited *Spencer* as taking the opposite stance on the issue presented here. Pet. App. 12a. For the same reason, respondent dismisses the conflict evident from *Blackfoot Livestock Comm'n Co. v. Dep't of Agric.*, 810 F.3d 916, 922 (9th Cir. 1987); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925 (10th Cir. 1974); and *Peterman v. USDA*, 770 F.2d 888 (10th Cir. 1986). BIO 9-11.

Conspicuously missing from the BIO is any explanation of why this distinction should make any difference. Both sections of the PSA contain identical language making it "unlawful" to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. §§ 192(a) & 213(a). The two provisions are part of the same statute, were enacted at the same time, and have the same legislative history. The difference is simply that the two sections regulate different actors in the same market. PSA § 202(a) applies to packers,

swine contractors, and poultry dealers with respect to meat, while PSA § 312(a) applies to stockyard owners, market agencies, and dealers. A single entity may even fall within *both* provisions. Respondent offers no reason why Congress would have used the same language to prohibit a stockyard owner or market agent from engaging in a particular practice, while allowing a packer or live poultry dealer to do the same.

Absent some compelling reason to the contrary, identical language in the same statute is interpreted in the same way. Respondent, however, does not even suggest that there is any reason for courts interpreting the PSA to depart from the "'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). And to the extent that the conflicting decisions are based on some as-yet-unexplained departure from that "normal rule," subjecting multistate actors to inconsistent legal obligations, that fact would provide an additional reason to *grant* certiorari, not deny it.

B. There Is A Conflict Among The Federal Courts Of Appeals.

The petition identified a longstanding conflict on the question presented between the Seventh and Eleventh Circuits, on the one hand, and the Ninth and Tenth Circuits on the other hand, and explained that decisions of the Eighth and Sixth Circuits add to the confusion. The petition also argued that the question presented is important and that the conflict requires this Court's immediate resolution—points that go largely unrebutted by the respondent. Rather than confront the conflict and its importance head-on, respondent frames the question

presented narrowly and seeks to slice away at the conflict case-by-case. As we now show, that strategy is unavailing.

1. Respondent first brushes aside the conflict between the Eleventh Circuit and the Ninth Circuit by noting that although *Spencer* and *Blackfoot* interpreted statutory language identical to that at issue here, they did not specifically involve 7 U.S.C. § 192(a). Tellingly, respondent does not dispute that in *Spencer*, 841 F.2d at 1454, the Ninth Circuit held that a showing of fraud alone, because it is "deceptive," may violate the PSA—a result that the Eleventh Circuit recognized as directly at odds with its decision here. Pet. App. 12a. Respondent never attempts to explain why identical language would be interpreted differently in two companion provisions of the same statute. Similarly, respondent does not deny that *Blackfoot* held that check-kiting violates the PSA because it is "deceptive," a decision that also conflicts with the rule announced by the Eleventh Circuit, but again dismisses the conflict because *Blackfoot* rested on § 213(a) rather than § 192(a). BIO 9.

In a further attempt to minimize the Eleventh Circuit's acknowledged conflict with the Ninth Circuit, respondent relies heavily on isolated language in *DeJong Packing Co. v. USDA*, 618 F.2d 1329 (9th Cir. 1980), and even suggests that *Spencer* is not controlling law in the Ninth Circuit because it deviates from *DeJong*. BIO 9. But as we explained in the petition (at 9 n.1), *Spencer* and *DeJong* are not irreconcilable because *DeJong* involved *only anticompetitive conduct* and thus had no occasion to address whether the PSA reaches other unfair or deceptive practices that do not have an anticompetitive effect. Respondent completely ignores this point. Indeed, the allegations at issue in *DeJong* were quintessential antitrust allegations involving a conspiracy by a group of packers to force auction stockyards to change their terms of sale. *Id.* at

1335 ("What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action; to obtain by concert of action market power not possessed by the purchasers individually and, by exercise of that market power, to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces."). Moreover, although not strictly relevant to the issues before it, the court noted that the PSA "may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose," and recognized that the Act "proscribes practices which the Sherman Act would permit." *Id.* at 1335 n.7.

2. Respondent's approach to the decisions of the Tenth Circuit—*Peterman* and *Hays*—is no different. In *Peterman*, the court upheld the Secretary of Agriculture's determination that a meat packer who employed "bait and switch" sales tactics had "engaged in unfair and deceptive practices" in violation of the PSA. 770 F.2d at 889. Respondent contends that *Peterman* does not conflict with the decision below because the court's opinion did not specifically address whether the packer had violated the prohibition on "unfair, unjustly discriminatory, or deceptive practice[s]" in 7 U.S.C. § 192(a) or in § 213(a). Of course, because the case involved a packer, it was § 192(a) and not § 213(a) that applied. *See* 770 F.2d at 889 ("Our study of the matter leads us to conclude that Peterman is a 'packer' engaged in 'commerce' and is otherwise within the ambit of the Packers & Stockyards Act."). But more importantly, that the court did not find it necessary to mention which specific PSA provision was involved in order to explain its conclusion that the conduct was "deceptive" under the PSA only underscores that it was irrelevant to the decision—as, indeed, it is irrelevant to all of the decisions that make up the circuit conflict.

Similarly, respondent dismisses the Tenth Circuit's decision in *Hays*, which held that a failure to pay for livestock violated

the PSA, because the case was predicated on violations of 7 U.S.C. § 208, which makes it unlawful to engage in practices that are "unjust, unreasonable, or discriminatory." But the opinion in *Hays* makes clear that the decision was not based on any differences between this language and the language of §§ 192(a) and 213(a). On the contrary, *Hays* relied on case law interpreting these other sections of the PSA and explicitly rested its decision on deference to the USDA and "the broad policy of the Act" (498 F.2d at 932), which, in *Hays*' view, does not require a finding of anti-competitive conduct.

3. Respondent also completely ignores decisions of the Eighth and Sixth Circuits that contribute to the confusion concerning the scope of the PSA. As we pointed out in the petition (at 9), although the Eighth Circuit has held that conduct likely to harm competition can establish a PSA violation, *Farrow v. USDA*, 760 F.2d 211, 214 (8th Cir. 1985), the Eighth Circuit has also held that a refusal to pay for livestock may violate the PSA, *Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978), as may the commingling of funds from shippers' and consignors' accounts by a market agent, *United States v. Donahue Bros.*, 59 F.2d 1019 (8th Cir. 1932). Further complicating the picture, the Sixth Circuit has held that even unintentional and harmless misweighing violates the PSA, but prefaced its conclusion by noting that misweighing can have an adverse effect on the market. *Parchman v. USDA*, 852 F.2d 858, 864 (6th Cir. 1988).

C. This Case Presents An Excellent Vehicle To Address And Resolve The Circuit Split.

Respondent suggests that the Court should deny certiorari because this case rests on the theory that Fieldale violated the PSA by terminating the Londons' contracts without economic justification, rather than on a theory of "predatory intent in

terminating the grower contracts." BIO 12 (quoting Pet. App. 15a n.8). According to respondent, petitioners failed "to preserve predatory intent as an alternative basis for imposing liability." BIO 4. This argument is a red herring.

First, the question whether the PSA requires a showing of competitive injury was squarely presented below, was analyzed at length by the Eleventh Circuit, and was resolved in a manner that avowedly placed the Eleventh Circuit on one side of a longstanding circuit split. The jury found that respondent terminated the petitioners' contract without economic justification and awarded them $164,000 on that count. Whether the petitioners could have pursued an alternative claim under a theory of predatory intent is irrelevant. The question is whether the conduct that the jury found unfair constitutes a violation of the PSA.

Second, as this Court has recognized, "predatory intent" is synonymous with "anticompetitive intent." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 256-57 & n.17 (1993) (citing cases). Anticompetitive *effect* may be proved inferentially by a demonstration of predatory *intent*. *Id.* at 257 n.17; *see also Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 696-98 & n.12 (1967). But the Londons did not set out to prove predatory intent or any other species of antitrust violation. Instead, what the Londons alleged, and what they successfully proved to the jury, was that Fieldale engaged in an unfair and deceptive business practice consisting of a contract termination without economic justification. The only question is whether that showing is sufficient, as a matter of law, to violate the PSA.

Further, respondent's assertion that the Londons "failed to present sufficient evidence to prevail under any legal standard" is simply wrong. BIO 13. The jury found that Fieldale

terminated the Londons' contract without economic justification, and the only issue is whether that finding establishes a violation of the PSA.

D. Respondent Does Not Meaningfully Address The Importance Of The Question Presented, The Disruptive Effect Of The Eleventh Circuit's Failure To Defer To The USDA, Or The Merits Of The Case.

Although respondent vigorously attempts to downplay the conflict among the circuits concerning the scope of the PSA, it does not meaningfully address our discussion of the importance of the question presented, the disruptive and incongruous effects of the Eleventh Circuit's failure to defer to the USDA, or the compelling case that the plain meaning and legislative history of the PSA contradict the Eleventh Circuit's holding.

1. As to the merits, respondent does little more than parrot decisions on the same side of the circuit conflict as the Eleventh Circuit. The fact that some courts have thoroughly analyzed the question and reached one conclusion, while other courts have throughly analyzed the question and reached the opposite conclusion, demonstrates that the issue is ripe for this Court's review. Although respondent emphasizes that the "monopoly of the packers" was the "chief evil" to which the PSA was directed (BIO 15), it does not confront the petition's argument that the PSA was also intended to protect against unfair and deceptive business tactics. *See* Pet. 13-15; *Spencer*, 841 F.2d at 1455 ("The primary purpose of the [PSA] was to 'assure fair competition and *fair trade practices* in livestock marketing, . . . [i]t was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.") (emphasis in original; citation omitted). Nor does respondent acknowledge, much less dispute, our arguments concerning the plain language of the

PSA—*in particular, the strong inferences to be drawn from the* statute's inclusion of an anticompetitive-effect requirement in some subsections of the PSA, but not in others. Pet. 10-13.

2. The "Secretary of Agriculture, who is responsible for administering the Act, has consistently interpreted the Act to prohibit all unfair practices, regardless of whether those practices cause a competitive injury." USDA Br. 10. Respondent disregards the petition's demonstration that, as a result of the Eleventh Circuit's refusal to defer to the USDA's position, the *same* language of the PSA will, at least within the Eleventh Circuit, impose *different* requirements depending on whether meat or poultry is involved. Thus, more is at stake than mere "error correction." BIO 15.

The Eleventh Circuit's failure to defer to the USDA is significant not only because it is incorrect as a matter of administrative law, but also because it threatens to disrupt the PSA's comprehensive regulatory scheme and has anomalous results with significant practical consequences. "Informed by her unique knowledge of and experience with the poultry industry, the Secretary [of Agriculture] has concluded that remedies for breach of contract are not adequate either to deter arbitrary breaches of growing contracts or to protect poultry growers from the economic harms that result from such a breach." USDA Br. at 10. The Eleventh Circuit's rejection of the USDA's position deprives poultry growers such as the Londons of important protections afforded by the PSA. "Because of the unequal bargaining power that exists in the poultry industry, the terms of growing contracts generally favor the processors (such as Fieldale) and place the economic risks of contracting on the growers (such as the Londons)." *Id.* As we pointed out in the petition, the decision below will heighten that unequal bargaining power in a circuit that includes two of the top chicken-producing states in the country.

3. Finally, respondent chooses not to address the importance of the question presented and the untenable nature of the circuit conflict. Instead, respondent suggests that state-law remedies can adequately address the harms that, under the Eleventh Circuit's decision, will no longer be addressed by the PSA. This argument ignores the USDA's expert conclusion, discussed above, that state remedies are inadequate to protect growers. It also runs counter to the determination by Congress that only a compr hensive national regulatory scheme can adequately address the unique risk of both unfair competition and unfair trade practices in the industry. Congress viewed "the business of producing, preparing, and distributing meat products [as] surrounded by conditions which sharply differentiate it from any other industry and place it in a class apart." S. Rep. No. 66-429, at 1 (1920). Congress believed that the industry was "charged with a public interest that [could] not be adequately safeguarded otherwise than through special legislation." *Id.* Respondent's suggestion that protections from unfair trade practices in the poultry industry should depend entirely on an inconsistent patchwork of state law is thus directly at odds with the intent of Congress.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, DC 20016
(202) 237-7543

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Cynthia Noles Johnson
Post Office Box 48
Cohutta, GA 30710
(706) 694-4298

November 2005